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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 679

MARKET STREET RAILWAY COMPANY
(a corporation),
Petitioner,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, FRANCK R. HAVENNER, C. C. BAKER, JUSTUS F. CRAEMER, RICHARD SACHSE and FRANK W. CLARK, the members of and constituting the Railroad Commission of the State of California,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California.

CYRIL APPEL,
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PRINAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No.

MARKET STREET RAILWAY COMPANY (a corporation),
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RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, FRANCK R. HAVENNER, C. C. BAKER, JUSTUS F. CRAEMER, RICHARD SACHSE and FRANK W. CLARK, the members of and constituting the Railroad Commission of the State of California,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Market Street Railway Company, a corporation, by its attorneys, respectfully petitions this Court to

grant a writ of certiorari to review the final order and decision of the Supreme Court of the State of California entered in the above entitled cause on June 18, 1946, after the Supreme Court of the United States had affirmed the original judgment of the Supreme Court of the State of California (R. 119-147) in said cause. (324 U. S. 548; rehearing denied 324 U. S. 890.)

OPINIONS BELOW.

The opinion of the Supreme Court of the State of California (R. 171-182) and the dissenting opinion of Mr. Justice Edmonds, concurred in by Mr. Justice Schauer (R. 183-188), are reported in 28 Advance California Reports 387, 171 Pac. (2d) 875.

JURISDICTION.

The judgment sought to be reviewed is an original order made by the Court below, which is the highest Court of the State of California. It was made and entered June 18, 1946. (R. 171-188.) Petitioner duly filed its Petition for Rehearing as to said order on July 3, 1946 (R. 188), but the same was denied without opinion on July 15, 1946 (R. 212), and said order is final.

On September 23, 1946, by order of Mr. Justice Rutledge the time within which the petition for certiorari herein might be filed was extended for 30 days from October 15, 1946. (R. 217.)

Jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925.

The Federal right, privilege or immunity claimed is based upon Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the final order and decision of the State Court as to which review is here sought, if enforced, will deprive petitioner of its property without due process of law.

The Federal question was set up and claimed in the "Petition of Market Street Railway Company for Order Superseding or Modifying Order Directing Payment of Impounded Funds", dated May 9, 1945. (R. 158, 159.) The Federal question was again raised in petitioner's "Final Report and Supplemental Petition", dated January 8, 1946. (R. 167, 168-169.) The same question was also asserted and set up in petitioner's "Final Brief in Support of Petition and Supplemental Petition", mentioned above, and in opposition to the claims of the State of California and City and County of San Francisco.[1] Petitioner set up the same question for the last time in its petition for rehearing of the order of said Supreme Court as to which review is here sought. (R. 188, 189-190, 191-192, 200-201, 210.)

[1]This Final Brief was omitted from the printed record herein by the Clerk, but is a part of the record certified by the Clerk of the California Supreme Court.

The Federal question involves the right of the California Supreme Court to make the order set forth below.[2]

Petitioner has contended throughout this proceeding that it was, and is, the legal owner of all fares collected by it pending final determination of the review proceedings, subject to the legal duty to refund any amount in excess of the rate fixed by the order of the Railroad Commission *to the persons who paid the same,* if said order be sustained. Petitioner has further contended that after the time fixed by the State Court within which refunds might be claimed had expired, it was, and is, the owner of the unclaimed excess charges, free from the claims of any person, and that the Courts of California may not arbitrarily take such fund, or require petitioner to pay over the amount thereof to the City and County of San Francisco without violating the due process clause of the 14th Amendment.

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[2] "It is ordered that the order of this court dated March 8, 1944, staying execution of the order of the Railroad Commission pending final determination of the review proceeding, be and the same is hereby modified by substituting and naming the City and County of San Francisco as the recipient of the unclaimed portion of the excess fare accumulated during the pendency of the review proceeding."

"It is further ordered that upon receipt by the Clerk of this court of a cashier's or a certified check in the sum of $688,751.58 (representing the sum of $693,780.51, the amount of the unclaimed excess fares, less the sum of $5,028.93, the company's expense in making refunds), payable to the City and County of San Francisco, the Clerk is directed to deliver to Market Street Railway Company's duly authorized representative the securities deposited by the company, pursuant to the order of March 8, 1944, and to sign and accept mutual acknowledgements evidencing the completed transaction. Thereupon the Market Street Railway Company shall be deemed discharged from further liability under the stay order and the surety on its bond of $100,000.00 shall stand exonerated" (R. 182).

The jurisdiction of this Court to review the decision and final order of the Court below by certiorari under Section 237 (b) of the Judicial Code, as amended, is believed to be fully sustained by the following decisions of this Court:

Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226;
Missouri Pac. R. Co. v. Nebraska, 164 U. S. 403;
Missouri Pac. R. Co. v. Nebraska, 217 U. S. 196;
Great Northern R. Co. v. Cahill, 253 U. S. 71;
Scott v. McNeal, 154 U. S. 34.

The Supreme Court of the State of California in its opinion did not in terms specifically decide the federal question presented by petitioner herein, but such actual decision or consideration of the claim of violation of the 14th Amendment to the United States Constitution is not required. It has been held repeatedly that it is sufficient that the federal question was fairly presented by the record, was necessary to a determination of the cause, and that no adequate nonfederal ground of decision appears.[3]

Where a federal claim is timely and properly asserted before a State Court, the failure of the State Court to pass upon the federal question thus asserted is not conclusive upon the Supreme Court, but the latter will proceed to determine whether there is any non-federal ground of decision which independently and adequately supports the judgment. *Chicago, Burlington & Quincy Ry. v. Illinois ex rel. Drainage Com'rs*, 200 U. S. 561, 580, 581; *West*

[3] *Chapman v. Goodnow's Adm'r*, 123 U.S. 540, 548; *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 236; *Chicago Life Ins. Co. v. Needles*, 113 U.S. 574, 579; *Erie R. Co. v. Purdy*, 185 U.S. 148, 154; *Roby v. Colehour*, 146 U.S. 153, 159; *Dewey v. City of Des Moines*, 173 U.S. 193, 199; *Dorchy v. Kansas*, 272 U.S. 303, 308, 309.

Chicago St. Railroad Co. v. Illinois ex rel. City of Chicago, 201 U. S. 506, 519, 520; *Wood v. Chesborough,* 228 U. S. 672, 676-680; *Davis v. Wechsler,* 263 U. S. 22, 24.

Federal rights are denied as well by a refusal of the State Court to expressly rule upon a claim of right under the Federal Constitution, as by an erroneous decision in respect to such questions.

Lawrence v. State Tax Commission of Mississippi, 286 U. S. 276, 282.

Here the Court below in its majority opinion did not even mention the fact that your petitioner had timely invoked the protection of the Fourteenth Amendment against the claims of the City and County of San Francisco.

However, in the dissenting opinion of Mr. Justice Edmonds (R. 183-188) the constitutional right of your petitioner not to be deprived of its property is recognized when he says:

> "In my opinion, the Market Street Railway Company is entitled to retain the accumulated fund representing excess fares paid by its patrons. It is said that because of the provisions of the stay order the carrier may not successfully maintain a claim of legal ownership of the money now in its possession. *But by such an order, this court could not confiscate for the public property which the railroad might thereafter lawfully acquire, nor prevent passengers from abandoning to the corporation amounts paid in excess of the reduced rate during the time the order of the railroad commission was held in abeyance.*"

No tenable independent non-federal ground of decision appears in the opinion of the State Court.

The only persons who sustained any injury or damage by reason of the stay order which permitted your petitioner to charge a fare of seven cents instead of six cents during the period while the order of the California Railroad Commission reducing petitioner's fare was under review by the California Supreme Court and this Court were the persons who paid the extra penny per ride. Those persons, after said order of the Railroad Commission was upheld, were afforded an opportunity to retrieve such excess charges without cost or expense during a period of six months under a procedure devised by the California Supreme Court. After the expiration of such period their right to claim refunds was barred by the Court's order.

The street railway company and its passengers were the only parties pecuniarily interested in any degree in this refunding operation, or in the so-called "impounded fund" represented by your petitioner's securities deposited with the Clerk of the California Supreme Court "as further security to enforce prompt payment by petitioner of all damages caused by the delay in the enforcement of said decision and order of the Commission and of all moneys any person may be compelled to pay petitioner for transportation pending review in excess of the charges fixed by said decision and order of the Railroad Commission, and of all moneys payable to the State of California, in the event said decision and order are affirmed."

It is conceded in the opinion of the Supreme Court of California that at the time in question the California Public Utilities Act contained no provision either requiring, or authorizing, the Supreme Court to order a public utility to pay over to the State of California any unclaimed excess charges in its possession or to award any impounded funds to the State *or to any other person or corporation unless they had paid an excess fare.*

The California Supreme Court in its opinion does not claim to act under any legislative authority, but claims the power to award the unclaimed excess charges to the City and County of San Francisco upon the following theory:

> "The excess fares are impounded funds in the custody of the court, although they are represented by the securities on deposit. * * * This Court has the power and the responsibility of protecting the fund and of disposing of it in accordance with the applicable principle of law and equity *for the protection of the litigants and the public whose interests are affected by the final disposition thereof.* The court is said to be free, in the discharge of that duty and responsibility, to use broad discretion in the exercise of its powers so as to avoid an unlawful or unjust result. * * *."

> "Pursuant to its retained jurisdiction and *its inherent power* to dispose of the impounded moneys in accordance with the foregoing principles, this court will consider the merits of the claims of each of the parties and dispose of the fund in accordance with the law and the equities thus appearing."

It will be noted in the above excerpt that the Supreme Court claims it has the power of disposing of the fund *"for the protection of the litigants and the public whose interests are affected by the final disposition thereof."*

Who were the litigants before the Supreme Court of California? They were petitioner and the California Railroad Commission. It is significant that neither the California Railroad Commission nor its attorneys took any part in the proceedings after your petitioner had completed the refunding operation and had filed its final report. Its duty to the public was then completed; it had no interest in the unclaimed fund.

What is meant by "the public whose interests are affected by the final disposition of the fund"? The only members of the public who had any interest in the fund were those persons who had paid a fare in excess of that prescribed by the Railroad Commission. All persons who presented claims were paid. Those persons, who were entitled to a refund but did not present their claims within the time allowed by the Supreme Court, after the time had expired, no longer had any interest in the fund because their causes of action were barred. *Hence, it appears that no members of the public had any interest in the fund to be affected by the disposition thereof.*

Are such transcendental "inherent powers" adequate to sustain the final order of the Court, and to justify the taking of petitioner's property without due process of law in complete disregard of the 14th Amendment to the Constitution of the United States?

Is a ground of such evanescent character such that it may meet the requirements of this Court as set forth in its decisions as to what is adequate to support the judgment, that is:

1. Is it broad enough to sustain the judgment?

2. Is it independent, or is it so interwoven with the federal question as to be incapable of separate treatment and determination?

3. Is it fair, tenable, and substantial, or is it unsubstantial and illusory?

4. Is it well founded, or is it so certainly unfounded that it may be regarded as *essentially arbitrary* or a mere device to prevent a review of the decision upon the federal question?

The Supreme Court of California in its opinion points to no *law*, either statutory or common law, in support of its order, but in order to deprive petitioner of its property relies upon its alleged "inherent powers", whatever they may be.

It is respectfully submitted that the decision of the Supreme Court of California is not based upon a non-federal ground. If, however, this Court considers the decision to be based upon the ground that the State Court has the inherent power to take petitioner's property and to award the same to whomsoever the Court desires to make the object of its beneficence, then your petitioner contends that such ground, if it be considered non-federal in character, is so interwoven with the federal question of the impairment of the constitutional rights of petitioner

as not to be an *independent* ground and of *sufficient breadth* to sustain the decision.

If it be urged that the decision of the State Court rests upon a non-federal ground, it is incumbent upon this Court to ascertain for itself, in order that constitutional guaranties may appropriately be enforced, whether an asserted non-federal ground independently and adequately supports the judgment. *Enterprise Irrigation District v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164; *Union Pacific R. Co. v. Public Service Comm.*, 248 U.S. 67, 69, 70; *Ward v. Love County*, 253 U.S. 17, 22; *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540; *Abie State Bank v. Bryan*, 282 U.S. 765.

Where the non-federal ground is so interwoven with a valid federal ground as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, the jurisdiction of this Court to review by certiorari is plain. *Enterprise Irrig. Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157; *Creswill v. Grand Lodge, K. P.*, 225 U. S. 246, 261.

QUESTIONS PRESENTED.

The questions presented for the determination of this Court are:

1. Is a street railway company the legal owner of the sum of money collected by it from a passenger as the consideration for transportation on its cars?

2. If a state railroad commission issues an order requiring a street railway company to reduce its established fare from 7 cents to 6 cents, but a State Court, acting under legislative authority therefor, makes an order suspending the operation of such commission order, is not the company the legal owner of the entire amount of all fares collected by it during the time the operation of such order is suspended or stayed?

3. After the collection by a carrier of fares in excess of that fixed in an order of a state railroad commission, the operative effect of which order was suspended by a Court pending review, and after such commission order is sustained, does not a cause of action against the carrier then arise in favor of each passenger for the amount of the excess fare paid by him, and is not the relationship existing between the carrier and such passengers that of debtor and creditor?

4. May not the owner of a cause of action to recover excess charges paid to a public utility abandon his property therein to such utility, or, by forbearance to claim such excess charges within the period allowed for making claim therefor, waive his claim?

5. If the passengers of a common carrier fail to assert their claims against such carrier for amounts paid by them in excess of a rate fixed by a regulatory body, may a Court require the carrier to pay over to a municipal corporation which had paid no part of such excess charges, and is a stranger to the proceedings, the entire balance remaining, without taking the property of the carrier without due process of law in violation of Section 1 of

the 14th Amendment to the Constitution of the United States?

6. After the time has expired for persons to claim refunds of excess charges paid by them to a public utility, if a Court orders the utility to pay over the amount of all unclaimed excess charges to the purchaser of the operative properties of the utility, who had no interest in the properties when the excess charges were collected, and who did not purport to purchase any rights in such excess charges, is not the property of the utility taken without due process of law?

STATUTES INVOLVED.

Sections 67 and 68 of the Public Utilities Act of the State of California as they existed during all of the times herein mentioned are set forth in the Appendix hereto.

STATEMENT OF THE CASE.

The Railroad Commission of the State of California made an order reducing the fare of petitioner from 7 cents to 6 cents. (R. 2.) Petitioner filed a petition for a writ of certiorari to review said order and for a stay pending review with the Supreme Court of the State of California (R. 1-13), and, after the hearing required by Section 68 of the California Public Utilities Act (Appendix hereto), the Court made an order on March 8, 1944 staying and suspending the decision and order of the Commission pending review (R. 115-119), and, as required

by said Act, found that great and irreparable damage would be sustained by petitioner in the event said order and decision were annulled unless a stay be granted. (R. 116.) As required by the stay order, petitioner filed a suspending bond in the sum of $100,000. (R. 119.) Other pertinent terms of the stay order are set forth in the footnote hereto.[4]

A few months later the Commission order was affirmed by the State Court and judgment entered accordingly (R. 119, 147), whereupon your petitioner prosecuted an appeal to this Court and the stay previously granted was

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[4] "Petitioner shall deposit with this Court on the first day of each month during the pendency of this review proceeding, beginning on April 1, 1944, a Certificate of Indebtedness 7/8% issued by the United States Government, of the face amount of $100,000, payable to bearer, to be held by this Court as further security to enforce the prompt payment by petitioner of all damages caused by the delay in the enforcement of said decision and order of the Commission and of all moneys any person may be compelled to pay petitioner for transportation pending review in excess of the charges fixed by said decision and order of the Railroad Commission, and of all moneys payable to the State of California, in the event said decision and order are affirmed." (R. 117.)

"In the event that this court finally affirms said decision and order of the Railroad Commission, and in the further event that the persons entitled to a refund of the excess charges collected by petitioner during this review proceeding do not claim all of such excess charges or moneys within six months after the final decision of this Court, the State shall be entitled to all such excess charges or moneys which petitioner has unsuccessfully attempted to refund, to be paid to it under such terms and conditions as the court may hereafter prescribe.

Acceptance by petitioner of the benefits of the stay hereby ordered shall be deemed an acceptance of and a consent to the terms and conditions prescribed herein.

This court retains jurisdiction to alter, amend, modify or supercede this order, on motion of either party, or on its own motion, as the interests of justice may require." (R. 118-119.)

continued in full force and effect pending said appeal. (R. 148-149.)

On September 29, 1944, petitioner herein sold and transferred all of its operative properties to the City and County of San Francisco. (R. 153.) By the terms of the agreement of sale on said date the City and County assumed all obligations of the ownership and operation of said operative properties. Petitioner surrendered its operating permit and all franchises and licenses, and was relieved from any and all obligations in connection with said properties and was discharged from any and all obligations to City under said operating permit and franchises. (R. 169-170.)

During the time the successive stay orders of the State Court were in effect, petitioner collected from its passengers the total sum of $705,794.96 in excess of the rate ordered by the Commission (R. 167, 168), and in accordance with the terms of the stay order deposited with the Clerk of the California Supreme Court U. S. Certificates of Indebtedness of a face value of $600,000. (R. 213.)

After this Court affirmed the judgment of the California Supreme Court (324 U. S. 548), on April 28, 1945, City and County of San Francisco filed a petition for modification of the stay order of March 8, 1944, and requested the Court to make an order directing that *all sums collected by petitioner in excess of a 6 cent fare* from and after March 1, 1944, be paid to said City and County to be used solely for the purpose of improving service for the street car riders of San Francisco. (R. 153-154.)

Your petitioner thereafter filed a petition (R. 158-162) and affidavit (R. 162-164) wherein it was prayed that the stay order be modified by directing the return to petitioner of funds (actually securities) deposited by it and not paid out in the redemption of refund coupons. By the affidavit it was shown that after setting up a reserve for the refund of excess fares, the Company had sustained a net operating loss of $502,803.78 for the nine months period ending September 30, 1944.

The Supreme Court made an order setting up a procedure to be followed by the Company in making refunds, establishing the time within which claims for refunds might be presented, to-wit, six months after the publication of a notice in four daily papers, and requiring the Company to file a report thereafter as to refunds made and the amount remaining unclaimed. (R. 164-167.) Pursuant to said order petitioner filed its final report and supplemental petition showing full and complete compliance with said order, and prayed that the unclaimed amount remaining in its hands after the expiration of the time fixed for making refunds, to-wit, $693,780.51, be declared to be and to remain the property of petitioner, that all securities deposited with the Clerk be delivered up to petitioner, and its bond exonerated. (R. 167-171.)

After oral argument and the filing of briefs, the California Supreme Court made and filed the order and decision as to which review is here sought and directed your petitioner to pay to the City and County of San Francisco the sum of $688,751.58 as a condition for the release of petitioner's securities and the exoneration of its bond. (R. 171, 182.)

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of the State of California erred:

1. In holding that petitioner was not the legal owner of all moneys collected by it for the transportation of passengers during the time the operation of the order of the California Railroad Commission was suspended by the order of said Court.

2. In holding that petitioner had no legal ownership in the unclaimed excess charges by reason of a condition inserted in the stay order by the Court over the objections of petitioner, which was not required or authorized by Sections 67 and 68 of the California Public Utilities Act, and in holding that petitioner necessarily accepted the conditions of the order by acceptance of the stay.

3. In holding that the situation of the city was changed by the acquisition of the operative properties of petitioner, and that such changed situation justified and required said Court to consider the alleged equities asserted by the city.

4. In granting the petition of the City and County of San Francisco on the ground that it had purchased the operative properties of your petitioner and would be obliged to spend $1,600,000 in making repairs as to which the company was alleged to be in arrears under its franchise at the time of sale, although the evidence is uncontroverted that by the agreement of sale your petitioner was released of and from any and all obligations to City under any operating permit, franchise or license, and such ruling impairs the obligation of said contract.

REASONS FOR GRANTING THE WRIT.

A. The federal questions are substantial.

The Supreme Court of the State of California has by implication decided federal questions of substance not heretofore specifically determined by this Court, and has decided such questions of public importance in a way probably not in accord with decisions of this Court heretofore rendered in analogous cases hereinafter referred to.

The amount involved is substantial, being almost $700,000. The same legal questions here presented are bound to recur and will sooner or later be brought to the attention of this Court in some other cause, unless settled by this Court now. The decision of the State Court is in conflict with the cases set forth in the following paragraphs.

B. The only cases in point are contrary to the decision of the State Court.

Illinois Bell Telephone Co. v. Slattery, 102 Fed. (2d) 58, is directly in point and supports the legal propositions contended for by petitioner. This Court denied a petition for certiorari in the above case (307 U. S. 648).

The *Illinois Bell Telephone Co.* case, in its many phases, has been before this Court on four occasions as stated in the opinion of the Circuit Court of Appeals, Seventh Circuit, the litigation continued from 1923 to 1939, and the unclaimed excess charges remaining in the hands of the telephone company, after the period for making refunds as fixed by the District Court had expired, was $1,688,295.68.

The telephone company filed a petition reciting that the period for making refunds had expired, that it had complied with all former decrees, and prayed for an order discharging it from any further liability for refunds and further adjudging that any sums unrefunded after payment of all proper claims filed on or before June 1, 1937, are and shall remain the property of the plaintiff, Illinois Bell Telephone Company. *Your petitioner in the case at bar did likewise.* (R. 167-171.)

The State of Illinois filed a petition asking that the unrefunded balance be paid over to it as a *trustee* for such subscribers as had not made application for refunds prior to June 1, 1937, which petition was denied by the District Court *because no statute existed authorizing such allowance,* and because the Illinois Commerce Commission had not acted as agent of the subscribers.[5]

The State of Illinois then filed a petition claiming that the unclaimed refunds were ownerless and therefore belonged to the State of Illinois in its sovereign right under a common law principle known as Bona Vacantia. This petition was denied by the District Court, *the telephone company was discharged in full from all liability under the previous decree of the Court, and remained the owner and in possession of the unrefunded and unclaimed balance.* The decree of the District Court was affirmed by the Circuit Court of Appeals, and certiorari was denied by this Court (307 U.S. 648).

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[5]It will be noted in the case at bar that the City and County asked that the *entire amount* of the excess charges be paid to it, not as a trustee or agent of the street car passengers, but to be used by it in the furtherance of its own business enterprise.

The Circuit Court of Appeals held:

1. That the provision in the decree fixing June 1, 1937, as the expiration of the period during which claims might be filed, was a limitation period and that the lapse of time not only barred the remedy, but destroyed the liability of the telephone company in so far as its subscribers were concerned.

2. *That the relationship existing between the telephone company and its subscribers was merely that of debtor and creditor, and that the company held the overcharges as its own property and not as a trustee for its subscribers.*

3. That the claim of the State of Illinois based on the common law principle of Bona Vacantia, which admittedly did not exist by reason of any statutory provision of the State of Illinois, was not well founded for the following reasons:

> "Many reasons are advanced by plaintiff as to why the doctrine is not here applicable. We shall not discuss them all as one good reason is sufficient. Under the state's theory, the only property which could pass to the state was that owned or possessed by the subscribers at the end of the limitation period. The argument of the state, in our opinion, is predicated upon a foundation which is unsound, in that, the subscribers, at the time when the state made claim, were neither in the possession of or the owner, of any property, or right of claim thereto. *Even before the period of limitation expired, they were not in the true sense, owners of the fund, or any part thereof, in the possession of the plaintiff by reason of the overcharges which they had paid. They had only a claim against plaintiff for a refund. As heretofore deter-*

> *mined, a relation of debtor and creditor existed. For those who failed to make claim in apt time, such relation was terminated.*" (Emphasis supplied.)

In *Pacific Gas & Electric Company v. Railroad Commission*, 16 Fed. Supp. 884, a three judge Court enjoined the Railroad Commission from enforcing an order reducing natural gas rates charged by Pacific Gas & Electric Company. On rehearing the Commission called to the attention of the Court the fact that a large sum of money had been impounded in Court by collection of the old rate during the pendency of the case. The Court ordered the impounded fund paid to the Company, saying:

> "This fund was impounded merely to preserve the status quo during the pendency of the action, and was stipulated to, authorized, and required solely because of the well-founded claim that if the consumers did not pay from month to month during the pendency of the action it would be difficult, if not impossible, to collect from them after decision. *As between the Railroad Commission and the public utility, the money so collected belongs to the public utility.*"

In *Northern Union Gas Co. v. Mayer*, 171 Fed. 602, where the Gas Company had deposited in Court certain sums collected by it in excess of a fixed rate for gas, after the disbursement of the major portion of such fund by a Special Master appointed for that purpose, the balance of such fund was turned over to the Gas Company by the Court, subject to the requirement that it continue to make refunds therefrom to its customers *until their claims were barred by the statute of limitations of the State of New York.*

A similar disposition of unclaimed refund deposits was ordered by the same Court in *Standard Gaslight Co. of City of New York v. Mayer*, 171 Fed. 604.

The questions presented on this petition are novel. Apparently no State Court has ever before attempted such an arbitrary seizure and confiscation of the property of an utility on its own motion and without any statutory authority therefor. There is no decision of this Court settling the questions presented by the judgment sought to be reviewed.

The opinion of the Court below was rendered by a divided Court. Five of the Justices of the California Supreme Court disregarded your petitioner's claim that to compel it to pay over the unrefunded excess fares remaining in its possession after the period of limitations for the presentation of claims for refund fixed by said Court had expired, to either the State of California, or to the City and County of San Francisco, would be to take petitioner's property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

The other Justices of the State Supreme Court recognized the constitutional right of your petitioner not to be deprived of its property by the judicial legislation of the majority, and protested against the confiscation of petitioner's property and the gift of the same to a municipal corporation for use in connection with a business conducted by it in its proprietary capacity.

C. Petitioner is the legal owner of all fares collected by it.

When each passenger boarded one of the cars or buses of your petitioner after the effective date of the order of the California Railroad Commission and dropped seven cents in the fare box, that money became the property of petitioner and was exacted from each passenger as the price for transportation. It is true that one cent out of each seven cents paid was in excess of the amount authorized to be charged by the order of the Railroad Commission, but the operative effect of such order had been stayed and suspended by an order of the California Supreme Court granted under the authorization for such stay contained in Section 68 of the California Public Utilities Act. (Appendix.)

This stay order legally authorized your petitioner to continue to collect seven cents, or one cent in excess of the rate imposed upon petitioner by the order of the California Railroad Commission. Hence, the entire fare collected was neither unlawful nor illegal so as to even warrant the suggestion that by reason of any illegality in the transaction petitioner did not gain title to the entire fare collected by it.

By the very nature of the transaction it was impossible for six cents out of each fare of seven cents to become the property of petitioner and one cent of each fare to remain the property of the passenger. The passenger necessarily paid the whole seven cents to petitioner who claimed the same as its property, duly earned by it as the consideration for the transportation furnished to the passenger. In compliance with the order of the Supreme Court your petitioner offered to each of its passengers

refund coupons as evidence of his payment of an excess fare so that if the Commission's order was upheld by the Courts, he might, if he chose, present claim against petitioner to recover the difference between the fare collected by the carrier and that fixed by the Railroad Commission.

From the time each fare came into the possession of your petitioner, the money became the property of petitioner, and it was responsible for the same. If the money was stolen, or if it was destroyed by fire, it would be the loss of the railway company, and such facts would not constitute a defense to the claim of a passenger for a refund of the excess fare if the order of the Commission should be sustained. Such loss would not affect the contingent claim or possible causes of action of its passengers any more than it would affect the claim or cause of action of any other creditor. After the decision of this Court affirming the judgment of the Supreme Court of the State of California, the contingent claim of each passenger ripened into a cause of action, and the relationship of debtor and creditor arose as between the company and its passengers.

By the order of the California Supreme Court of May 31, 1945, entitled "Order directing payment of excess fares impounded under prior order" (R. 164), it was provided that all applications for refunds must be made within six months from and after the publication of an advertisement once in four daily newspapers published in San Francisco, and that at the expiration of six months after the publication of the said advertisement in the newspapers all further claims should be barred. (R. 166.)

By the verified final report and supplemental petition of Market Street Railway Company it was shown that said advertisement had been published in four named daily newspapers on June 30, 1945. (R. 167.) Hence on January 1, 1946, all claims of passengers for refunds were barred under the limitation fixed by said Supreme Court.

The amount of excess fares remaining unclaimed by the persons or corporations paying the same in the hands of petitioner on that date was the sum of $693,780.51 (R. 168), and said sum is the property of petitioner free from any and all claims.

D. The judgment of the State Court is not authorized by any statute of the State of California.

It is provided in Section 67 of the Public Utilities Act of the State of California that:

> "No court of this state (except the Supreme Court *to the extent herein specified*) shall have jurisdiction to review, reverse, correct or annul any order or decision of the Commission *or to suspend or delay the execution or operation thereof,* or to enjoin, restrain or interfere with the Commission in the performance of its official duties; provided that the writ of mandamus shall lie from the Supreme Court to the Commission in all proper cases."

The portion which we have italicized above limits the power of the Supreme Court to suspend or delay the execution or operation of an order or decision of the Railroad Commission *to the extent specified in the act.* By Section 68 of the Public Utilities Act, which we have set forth in full in the appendix hereto, it is provided that

"during the pendency of such writ the Supreme Court *in the manner hereinafter provided* may, in its discretion, stay or suspend in whole or in part the operation of the Commission's order or decision."

The Legislature then proceeded to set forth in detail the exact manner in which the Supreme Court was authorized to stay or suspend the operation of the order of the Commission.

Section 68(b) of the Act provides that no order staying or suspending an order or decision of the Commission (except a temporary stay) may be made except upon notice, and if granted it is required that the order suspending the same shall contain a specific finding based upon evidence submitted to the Court and identified by reference thereto, that great or irreparable damage would otherwise result to petitioner and specifying the nature of the damage. The stay order of the Supreme Court, dated March 8, 1944, contains the findings required. (R. 115, 116.)

Section 68(d) of the Act provides that in case the order of the Commission is stayed the order of the Court shall not become effective until a suspending bond shall have first been executed and filed with and approved by the Court, payable to the people of the State of California and sufficient in amount and security *to insure the prompt payment by the party petitioning for the review, of all damages caused by the delay in the enforcement of the order or decision of the Commission and of all moneys which any person or corporation may be compelled to pay pending the review of the proceedings, for transportation*

in excess of the charge fixed by the order or decision of the Commission, in case said order or decision is sustained. The bond which was filed is in the words of the statute, and is unenforceable as to any other person, or for any other purpose.

The Court is further authorized by said Section 68(d) of the Act, in case it stays or suspends an order of the Commission in any matter affecting rates, in its discretion to direct the public utility to pay into Court from time to time, there to be impounded until the final decision of the case, under such conditions as the Court may prescribe, all sums of money which it may collect from any corporation or person in excess of the sum such corporation or person would have been compelled to pay if the order or decision of the Commission had not been suspended.

By Section 68(e) it is provided that in case the Supreme Court stays or suspends any order or decision *lowering any fare,* the Court shall require the public utility to keep such accounts, verified by oath, as may, in the judgment of the Court, suffice to show the amounts being charged or received by such public utility, pending the review, in excess of the charges allowed by the order or decision of the Commission, together with the names and addresses of the corporations or persons to whom overcharges will be refundable in case the order of the Commission is upheld. The Court is further authorized to require from time to time the party petitioning for review to give additional security, or to increase said suspending bond, whenever in the opinion of the Court

the same may be necessary to insure the prompt payment of said damages and said overcharges. By the same section, 68(e), it is provided:

> "Upon the final decision by the Supreme Court, all moneys which the public utility may have collected, pending the appeal in excess of those authorized by the order or decision of the Commission, together with such interest as may be reasonable, shall be promptly paid *to the corporations or persons entitled thereto* in such manner and through such methods of distribution as may be prescribed by the Court, should the Commission order or decision be upheld."

It is clear that "the corporations or persons entitled thereto" are the corporations or persons who were compelled to pay the excess fare. The passengers who paid the excess fare were the only persons damaged by reason of the stay order; hence they were entitled to recover from your petitioner the amount of excess fare paid by them. All who presented timely claims have been paid.

It clearly appears from a consideration of Sections 67 and 68 of the California Public Utilities Act (appendix) that the California legislature did not impose any duty upon a public utility to pay over to the State of California any unrefunded excess charges, nor did it authorize the State Supreme Court in granting a stay to insert a provision therein requiring a utility to pay over such unrefunded excess charges to any person or corporation, private or municipal, as the said Court might arbitrarily select to be the recipient of its bounty.

The Legislature in the first part of Section 68 distinctly said that the Supreme Court "*in the manner hereinafter*

provided" may in its discretion stay the Commission's order. The Supreme Court had discretion whether to grant or deny a stay in the first instance. If it found the fact of irreparable damage required to be first found, it could hardly refuse a stay in the exercise of judicial discretion, but, if granted, the Court was bound to do so in the manner provided by the Legislature, and it was not authorized to insert additional conditions. The nature and purpose of the bond required is specifically defined. The Court is authorized to require the impounding of excess charges.

But nowhere in the Public Utilities Act, nor in any other statute of the State of California, is the Supreme Court authorized to take away from a utility unclaimed excess charges remaining after the utility has paid over to the corporations or persons the amounts charged them in excess of the rate ordered by the Railroad Commission, and give the same to a municipal or private corporation, or even to the State of California itself, as the Supreme Court evidently contemplated doing when it made its original stay order.

Prior to 1933, Section 68(d) of the Public Utilities Act provided that after a certain period of time had expired after the final decision of the Supreme Court, and after notice by publication, all moneys not claimed within three months after the publication of said notice should be paid by the public utility, under the direction of the Commission, into the state treasury for the benefit of the general fund.

In 1933 this section was amended so as to eliminate all reference to the disposition of unclaimed excess charges.

(1933 Statutes of California, Chapter 442, pp. 1157-1160.) The section was also amended to provide that "the Supreme Court *in the manner hereinafter provided* may, in its discretion, stay or suspend in whole or in part the operation of the Commission's order or decision." Section 68 of the Public Utilities Act, as amended in 1933, was in effect during all of the period with which we are concerned in this cause.

It is respectfully submitted that when petitioner refunded to the persons and corporations, who presented their claims for refund within the time allowed by the order of the California Supreme Court therefor, the amounts to which they were entitled, petitioner fully discharged its legal obligations as a debtor to its creditors. As to those of the passengers who failed to present their claims within the time allowed by the California Supreme Court, their rights as creditors were extinguished, and petitioner is entitled to retain all unclaimed excess charges.

Illinois Bell Telephone Co. v. Slattery, supra.

E. Unauthorized conditions in a statutory bond or stay order may be treated as surplusage.

The conditions in the stay order of the State Court that "the State shall be entitled to all such excess charges or moneys which petitioner has unsuccessfully attempted to refund, to be paid to it under such terms and conditions as the court may hereinafter prescribe" and that "Acceptance by petitioner of the benefits of the stay hereby ordered shall be deemed an acceptance of and con-

sent to the terms and conditions prescribed herein" were inserted therein by the Court on its own motion and over the vigorous protest of counsel for petitioner. (R. 158, 159.) Petitioner did not stipulate or consent to such conditions. Nevertheless, the Court, although it found that petitioner would sustain a loss of $3,000 per day in revenue unless the stay be granted, inserted these conditions which were not prescribed or authorized by Section 68 of the Public Utilities Act, and petitioner was coerced to operate under the stay as written or else its right to challenge the validity of the order reducing its fares would be meaningless.

It has often been held that in the case of statutory bonds or stay orders which contain provisions or conditions not required by the statute or contrary to the requirements thereof, the unauthorized or illegal provisions may be disregarded and treated as surplusage.

United States v. Gordon, 3 L. Ed. 347, 7 Cranch 287;

8 *American Jurisprudence,* p. 717;

11 *Corpus Juris Secundum,* p. 410.

F. The City and County of San Francisco is not a party in interest entitled to assert a claim to the unrefunded excess fares.

Since the California Legislature amended Section 68 of the Public Utilities Act in 1933, by striking out the provision for the payment of unclaimed excess charges to the state treasurer for the benefit of the general fund, as we have heretofore shown, there has been no legislation

purporting to authorize the California Supreme Court to award charges collected by a street railway corporation in excess of the rate established by the Railroad Commission to anyone *other than the corporations or persons actually paying the same.*

That section requires a bond and authorizes the impounding of excess charges for the express purpose of insuring the prompt payment by the utility of all excess charges which any person or corporation may be compelled to pay pending the review in the event the order is sustained. If the order of the Commission is sustained the excess charges are to be promptly paid to the corporation or persons paying the same. The statute does not require, or even contemplate, that such excess charges should be paid anyone else. The persons or corporations paying the excess charges are the only real parties in interest.

Mr. Justice Edmonds in dissenting from the decision of the California Supreme Court stated the rule that only the real party in interest may recover charges collected in excess of established rates, saying:

> "Furthermore, applying the common law rule that the real party in interest is the proper party to maintain an action for the recovery of excessive charges, it has been held that although a shipper, who occupies the same position as a passenger of Market Street Railway Company, may maintain an action to recover overcharges unlawfully exacted from him by a common carrier, *the state, and upon principle its subdivisions, including municipalities, have no right to recover on behalf of individual shippers the amounts paid by them in excess of established rates.* (*State v. Chicago & A. R. Co.*, 265 Mo. 646, 13 A.L.R.

299.) I would, therefore, exonerate the sureties on the bond of the Market Street Railway Company and direct the clerk of this court to deliver to the carrier the securities deposited by it pursuant to the stay order."

It has been many times held that the sovereign in its representative capacity has no implied power to demand a general accounting for the purpose of impounding funds collected in excess of that by law allowed for the benefit of individuals entitled thereto, because the state, through its public officials, should not so assist either party in a private controversy. *Oklahoma v. Atchison, Topeka & Santa Fe Ry. Co.*, 220 U. S. 277; *People v. Albany S. R. R. Co.*, 57 N. Y. 164; *People v. Ingersoll*, 58 N. Y. 1, 17 Am. Rep. 178; *In re Benton*, 66 Vt. 507, 29 Atl. 805; *State ex rel. v. Dunbar*, 53 Ore. 45, 98 Pac. 878, 20 L.R.A. (N. S.) 1018.

In *Missouri, Kansas & Texas R. R. Co. v. No. Rd. etc. Comrs.*, 183 U. S. 53, Mr. Justice Brewer, delivering the opinion of the Court, said:

> "It is true that the state has a governmental interest in the welfare of all its citizens, in compelling obedience to the legal orders of all its officials, and in securing compliance with all its laws. But such general governmental interest is not that which makes the state, as an organized political community, a party in interest in the litigation, for if that were so the state would be a party in interest in all litigation, because the purpose of all litigation is to preserve and enforce rights and secure compliance with the law of the state, either statute or common. The interest must be one in the state as an artificial person."

As illustrative of our point that the City and County of San Francisco, a mere political subdivision of the state, has no pecuniary interest in the so-called impounded fund, we cite the case of *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, which was an action to restrain the enforcement by state officers of unjust and unreasonable rates fixed for carriers by state authority. To the point we quote:

> "Appellants invoke the doctrines laid down in these two quotations, and insist that this action cannot be maintained because the real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates is the state, and also because the statute under which the defendants acted and proposed to act is constitutional, and that the action of state officers under a constitutional statute is not subject to challenge in the Federal court. We are unable to yield our assent to this argument. *So far from the state being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the state can have arises when it abandons its governmental character and, as an individual, employs the railroad company to carry its property.* There is a sense, doubtless, in which it may be said that the state is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar

> will be taken from the treasury of the state, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not merely so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes and yet a frequent and unquestioned exercise of jurisdiction of courts, state and Federal, is in restraining the collection of taxes, illegal in whole or in part."

From the decisions of this Court and other courts, it is apparent that neither the State of California nor the City and County of San Francisco have any pecuniary interest in the impounded fund. There is no evidence in the record, nor has it ever been claimed by either the State or the City and County, that they, or either of them, ever paid to your petitioner one cent as a fare. Hence, the City and County of San Francisco is not a party in interest entitled under the Public Utilities Act to any part of the excess fares charged by your petitioner during the time the order of the Railroad Commission was stayed. The City and County of San Francisco was neither a party to the proceedings for a Writ of Review by the State Supreme Court, nor was it a party on the appeal in the main case to this Court.

G. The State Court erred in giving judgment against petitioner on an alleged obligation which had theretofore been released and discharged.

The Supreme Court of California based its decision in favor of the City and County of San Francisco upon the ground shown in the following extracts from its opinion:

"The City bases its claim for distribution to it of the unrefunded excess in part on its acquisition and operation of the properties of the railway company. The City refers to the greatly depleted and depreciated state of the properties, and to the condition of the roadbeds which alone necessitates the expenditure of over $1,600,000.00 to defray the cost of the repairs as to which the railway company was in arrears under its franchise at the time of sale and transfer."

"Equitable considerations dictate that the people of the City, who contributed the moneys and who now own and operate the properties which furnished the service when the excess fares were paid, are entitled to have them distributed for their benefit *in the rehabilitation of the physical properties which were acquired during the pendency of the review proceedings,* and for the improvement of the service afforded thereby. The distribution of the fund *in that manner and its application to the purpose specified will inure to the benefit of those whose payments accumulated the fund,* including both the people of the City and outsiders who have occasion to avail themselves of the service."

The effect of the consideration given by the State Court to the alleged depreciated value of the street railway system of your petitioner when it was purchased by the City and County of San Francisco, and the alleged default of your petitioner in its franchise obligations, in determining that said City and County was entitled to the excess fares remaining in the hands of your petitioner is to permit the City and County of San Francisco to recover upon an asserted liability and obligation which had been solemnly released by a written contract which discharged

your petitioner of and from any liability under its franchises or operating permit.

In the final report and supplemental petition filed by your petitioner after it had completed the refunding operations ordered by said Supreme Court, your petitioner alleged the terms of the sale agreement and set forth that at the time of the transfer of its properties it had been relieved of and from any and all obligations in connection with the said operative properties and relieved from any and all obligations to said City under or by virtue of the operating permit which it surrendered for cancellation or under any other franchises, permits or licenses granted by City to Company. (R. pp. 167, 169-170.) This contract provision was not considered by the State Court, and the decision impairs the obligation of said contract.

H. Conclusion.

In *Thompson v. Consolidated Gas Utilities Corporation*, 300 U. S. 55, this Court condemned, as violative of Section 1 of the 14th Amendment to the Constitution of the United States, an order of the Texas Railroad Commission which took the private property of the Consolidated Gas Utilities Corporation without compensation, and purported to give the same to the owners of approximately 180 gas wells. This Court there said:

> "Our law reports present no more glaring instance of the taking of one man's property and giving it to another."

Here the Supreme Court of the State of California has construed Section 68 of the California Public Utilities Act, which, in plain language, not susceptible of construction, interpretation or other legal device to change the meaning thereof clearly directs the payment by the utility of any charges or exactions held to be excessive to the persons or corporations paying the same, to authorize it to take petitioner's property and give it to a municipal corporation which has no interest in the property. The section recognizes that such persons or corporations are the only interested parties, and no provision is made for the payment of such excess charges, whether claimed or unclaimed, to anyone else.

It is respectfully submitted that the case at bar presents an even more glaring instance of the taking of the private property of a person and giving it to another.

WHEREFORE, it having been shown that this Court has jurisdiction to review the final order of the Supreme Court of the State of California under subsection (b) of Section 237 of the Judicial Code, as amended, and that said order, if carried out, will deprive petitioner of its property, to-wit, the sum of $688,751.58, without due process of law in violation of the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States, petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Chief Justice and the Associate Justices of the Supreme Court of the State of California, commanding them to certify and send to this Court the transcript of record in this case, to the end that

the order of said Court may be reviewed and reversed and that petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

Dated, San Francisco, California,
November 6, 1946.

MARKET STREET RAILWAY COMPANY
(a corporation),
Petitioner,
By CYRIL APPEL,
IVORES R. DAINS,
Counsel for Petitioner.

(Appendix Follows.)

Appendix

APPLICABLE PROVISIONS OF THE PUBLIC UTILITIES ACT OF THE STATE OF CALIFORNIA, 1933 STATUTES OF CALIFORNIA, CHAPTER 442, pp. 1157 TO 1160 INC.

Sec. 67. Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review (hereinafter referred to as a writ of review) for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined. Such writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown the same be continued. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of California. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as hereinafter provided; such questions of fact shall include ultimate facts and the findings

and conclusions of the commission on reasonableness and discrimination. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure of this state relating to writs of review shall, so far as applicable and not in conflict with the provisions of this act, apply to proceedings instituted in the Supreme Court under the provisions of this section. No court of this State (except the Supreme Court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; provided, that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the said constitutional question shall not be final.

Sec. 68. (a) The pendency of a writ of review shall not of itself stay or suspend the operation of the order or decision of the commission, but during the pendency of such writ the Supreme Court in the manner hereinafter

provided may, in its discretion, stay or suspend in whole or in part the operation of the commission's order or decision.

(b) No order so staying or suspending an order or decision of the commission shall be made by the Supreme Court otherwise than upon five days' notice and after hearing, and if the order or decision of the commission is stayed or suspended the order suspending the same shall contain a specific finding based upon evidence submitted to the court and identified by reference thereto, that great or irreparable damage would otherwise result to petitioner and specifying the nature of the damage; provided, however, that the Supreme Court may grant a temporary stay restraining the operation of the commission order or decision at any time before such hearing and determination of the application for a stay in the event it be of the opinion that irreparable loss or damage would result to petitioner unless such temporary stay be granted, but such temporary stay shall remain in force only until the hearing and determination of the application for a stay upon notice as aforesaid. The hearing of such application for a stay shall be given precedence and shall be expedited and assigned for hearing at the earliest practicable day after the expiration of notice hereinabove provided for.

(c) No temporary stay shall be granted by the Supreme Court unless it shall clearly appear from specific facts shown by the verified petition that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and hearing had

on a motion for a stay as hereinabove provided. Every such temporary stay shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it appears to be irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry not to exceed ten days as the court may fix unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary stay shall be granted without notice in the contingency specified the matter of the issuance of a stay shall be set down for hearing at the earlist possible time; and when the same comes up for hearing the party obtaining the temporary stay shall proceed with the application for a stay and if he does not do so the court shall dissolve the temporary stay.

(d) In case the order or decision of the commission is stayed or a temporary stay granted the order of the court shall not become effective until a suspending bond shall have first been executed and filed with and approved by the court, payable to the people of the State of California and sufficient in amount and security to insure the prompt payment by the party petitioning for the review, of all damages caused by the delay in the enforcement of the order or decision of the commission and of all moneys which any person or corporation may be compelled to pay pending the review of the proceedings, for transportation, transmission, product, commodity or service in excess of the charges fixed by the order or

decision of the commission, in case said order or decision is sustained. The court, in case it stays or suspends the order or decision of the commission in any matter affecting rates, fares, tolls, rentals, charges or classifications may also in its discretion direct the public utility affected to pay into court from time to time, there to be impounded until the final decision of the case, or into some bank or trust company paying interest on deposits, under such conditions as the court may prescribe, all sums of money which it may collect from any corporation or person in excess of the sum such corporation or person would have been compelled to pay if the order or decision of the commission had not been stayed or suspended.

(e) In case the Supreme Court stays any order or decision denying to the utility an increase in any rate, fare, toll, rental, charge or classification, the court may condition such stay or temporary stay so as to permit petitioner to charge a higher rate pending the determination of the review and may attach such further conditions to such stay or temporary stay as may appear to be reasonable.

In case the Supreme Court stays or suspends any order or decision lowering any rate, fare, toll, rental, charge or classification or stays any order or decision denying petitioner the right to charge an increased rate, fare, toll, rental, charge or classification and as a condition thereof permits the charging of higher rates, the court shall require the public utility affected to keep such accounts, verified by oath as may, in the judgment of the court, suffice to show the amounts being charged or received by such public utility, pending the review, in excess of the charges allowed

by the order or decision of the commission, together with the names and addresses of the corporations or persons to whom overcharges will be refundable in case the order or decision of the commission is upheld. The court may from time to time require said party petitioning for a review to give additional security, or to increase the said suspending bond, whenever in the opinion of the court the same may be necessary to insure the prompt payment of said damages and said overcharges. Upon the final decision by the Supreme Court, all moneys which the public utility may have collected, pending the appeal in excess of those authorized by the order or decision of the commission, together with such interest as may be reasonable, shall be promptly paid to the corporations or persons entitled thereto in such manner and through such methods of distribution as may be prescribed by the court, should the commission order or decision be upheld.

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CHARLES ELMORE CRO

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 679

MARKET STREET RAILWAY COMPANY
(corporation),
Petitioner,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, FRANCK R. HAVENNER, C. C. BAKER, JUSTUS F. CRAEMER, RICHARD SACHSE and FRANK W. CLARK, the members of and constituting the Railroad Commission of the State of California,
Respondents.

PETITIONER'S REPLY BRIEF.

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WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 679

MARKET STREET RAILWAY COMPANY
(corporation),
Petitioner,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, FRANCK R. HAVENNER, C. C. BAKER, JUSTUS F. CRAEMER, RICHARD SACHSE and FRANK W. CLARK, the members of and constituting the Railroad Commission of the State of California,
Respondents.

PETITIONER'S REPLY BRIEF.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

FOREWORD.

Petitioner desires to briefly reply to certain contentions urged in the answer of the City and County of San Francisco, and to clarify certain of the points made in its petition on file herein.

JURISDICTION.

In the brief of the City and County of San Francisco the case of *Fox River Paper Company v. Railroad Commission of Wisconsin*, 274 U. S. 651, is cited as authority for the proposition that this Court lacks jurisdiction to review the decision and judgment of the Supreme Court of the State of California. Upon examination it will be found that the cited case holds just the opposite and is authority for the granting of the writ of certiorari sought by petitioner herein. In that case the plaintiff in error drew in question the validity of a statute of the State of Wisconsin under the due process clause of the 14th Amendment, alleging that the determination of the Railroad Commission acting under the statute operated to deprive plaintiffs of their property without due process of law. The Court below upheld the validity of the act, and the case was brought before this Court on writ of error. This Court said with reference to its jurisdiction:

> "The right set up in the bill is one under the Federal Constitution. *Whether the state court denied that right or failed to give it due recognition is a question upon which the plaintiffs are entitled to invoke the judgment of this court. Our jurisdiction is not affected because the existence of the right for which constitutional protection is claimed depends*

upon state law. Cf. West Chicago Street R. Co. v. Chicago, 201 U. S. 506, 50 L. Ed. 845, 26 Sup. Ct. Rep. 845; Ward v. Love County, 253 U. S. 17, 22, 64 L. Ed. 751, 758, 40 Sup. Ct. Rep. 419; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. Ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann Cas. 1175; Appleby v. New York, 271 U. S. 364, 380, 70 L. Ed. 992, 999, 46 Sup. Ct. Rep. 569."

That the California Supreme Court has evaded the claims of petitioner herein that to arbitrarily award the amount of unclaimed excess fares to the City and County of San Francisco, a municipal corporation not shown to have paid any part thereof to petitioner, is to confiscate the property of petitioner in violation of the 14th Amendment, is clear from the opinion of that Court, and from the dissenting opinion of Mr. Justice Edmonds, where it is said:

"In my opinion, the Market Street Railway Company is entitled to retain the accumulated fund representing excess fares paid by its patrons. It is said that, because of the provisions of the stay order, the carrier may not successfully maintain a claim of legal ownership of the money now in its possession. *But by such an order, this court could not confiscate for the public property which the railroad might thereafter lawfully acquire, nor prevent passengers from abandoning to the corporation amounts paid in excess of the reduced rate during the time the order of the railroad commission was held in abeyance.*"

PETITIONER IS THE LEGAL OWNER OF ALL FARES COLLECTED BY IT.

In the opinion of the Court below the Supreme Court of California has arbitrarily endeavored to deprive your petitioner of its property by finding that petitioner was not the legal owner of the excess fares collected by it, giving as its reason the following:

> "In the stay order it was recognized that the Company should be entitled to the additional one cent for each fare collected pending review only if it prevailed and the Commission's order was annulled. That the Company should have no legal ownership in the excess in the event of affirmance was recognized in the stay order, namely in the purpose to prevent loss to the Company if the order should be annulled, and in the further provision for refund and disposition of the excess otherwise than to the Company in the event of affirmance. The Company necessarily accepted the conditions of the order by acceptance of the stay * * *."

We submit that there is nothing in the stay order which has any legal bearing upon whether or not petitioner became the legal owner of each fare of seven cents collected by it during the time the stay order was in effect. The stay order only exacted from petitioner a bond of $100,000 and required the deposit of securities, both to enforce the prompt payment by it of all damages caused by the delay in the enforcement of the order of the Commission and of all moneys which any person might *be compelled to pay petitioner* for transportation, pending review, in excess of the charges fixed by said decision and order of the Commission, and of all moneys payable to the

State of California, in the event said order was affirmed. (R. 115, 116-117.)

On the contrary, the provisions of the stay order emphasize that the passengers of petitioner would be *compelled* to pay the fare demanded by petitioner for transportation, and the inference is inherent therein that the Company would collect and hold such fares as its own property, but would refund to its patrons any amount determined to be excessive if the Commission order were sustained.

The coercive character of the order will be noted from the provision therein inserted by the Court below, over the objection of petitioner's counsel (R. 159), that "the State shall be entitled to all such excess charges or moneys which petitioner has unsuccessfully attempted to refund", and the provision that "Acceptance by petitioner of the benefits of the stay hereby ordered shall be deemed an acceptance of and a consent to the terms and conditions prescribed herein". (R. 118.)

The State Court had previously found that petitioner would lose $3000 per day unless the stay were granted. Under such circumstances petitioner was compelled to accept the stay order as written, but it does not follow, as asserted by the Court below, that the Company accepted the conditions of the order by acceptance of the stay.

This Court heretofore has had something to say about similar conduct of State Courts in connection with such duress and coercion as a ground for claiming consent to the deprivation of property. We refer to the case of *Union Pacific Railroad Company v. Public Service Com-*

mission of Missouri, 248 U. S. 67, from which it appears that the Commission charged the company nearly $11,000 for a certificate authorizing the issuance of an issue of bonds, although the company had only 6/10 of a mile of track in Missouri out of a line over 3500 miles long. The company was compelled to secure the certificate, for otherwise its bonds would have been unmarketable, and it would have been subject to heavy penalties. The company protested against the charge as an unconstitutional interference with interstate commerce and bad under the 14th Amendment. The company applied for certiorari and the Court of first instance upheld the company and held that only a fee of $250 should have been charged. On appeal the Missouri Supreme Court reversed the Court below on the ground that the company was estopped by filing its application.

This Court through Mr. Justice Holmes, after holding the charge to be an unlawful interference with commerce among the States, said:

> "The Supreme Court of the state avoided this question by holding that the application to the Commission was voluntary, and hence that the railroad company was estopped to decline to pay the statutory compensation. It is argued that a decision on this ground excludes the jurisdiction of this court. But the later decisions show that such is not the law, and that, on the contrary, it is the duty of this court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the Federal right has been waived. Creswill v. Grand Lodge, K. P., 225 U. S. 246, 56 L. Ed. 1074, 32 Sup. Ct. Rep. 822. *Were it otherwise, as conduct under duress involves*

a choice, it always would be possible for a state to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary, as was attempted in Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. Ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050."

"On the facts we can have no doubt that the application for a certificate and the acceptance of it were made under duress. The certificate was a commercial necessity for the issue of the bonds. The statutes, if applicable, purported to invalidate the bonds and threatened grave penalties if the certificate was not obtained. The railroad company and its officials were not bound to take the risk of these threats being verified. Of course, it was for the interest of the company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. *But the fact that a choice was made according to interest does not exclude duress.* It is the characteristic of duress properly so called." (Emphasis supplied.)

We think it will not be difficult for this Court to discern the application of the principles enunciated in the cited case to the facts presented in the case at bar where petitioner was given the choice of accepting the stay with the illegal and unauthorized conditions with reference to unclaimed excess charges therein contained, and the "confession" that it accepted the conditions if it accepted the stay, which was wrung from petitioner by the Court below so that it might point thereto as proof of voluntary submission, or taking the very real loss of $3000 per day in revenue pending the determination of its petition for

writ of review, with no chance to ever collect the same from its unknown passengers if it succeeded in overturning the commission order.

The City and County on pages 22 to 26 purport to reply to the petition on file herein on the merits, and among other things it is said that

> "We take issue with the assertion that the one cent excess in fare ever became the property of petitioner",

and the contention is urged that when petitioner took possession of the excess fare during the operative period of the stay order, it did so as a mere *custodian*. This is not a ground relied upon by the California Supreme Court as a basis for its decision, but it poses some interesting questions.

If petitioner did not gain title to the disputed extra cent upon its payment to petitioner by each passenger, it must follow that title was retained by the passenger. If so, then upon what basis can the Supreme Court of California justify its decision awarding the sum total of the excess fares to the City and County of San Francisco, and upon what legal basis can the City claim such excess fares?

Does such contention square with the *Bell Telephone Company* case which holds the relationship is that of debtor and creditor?

Counsel for the City and County assert on page 24 of their answer that had the State Supreme Court required your petitioner to deliver, day by day, the monies derived from the excess in fare to be impounded with the Court's own custodian, that your petitioner would not be bold

enough to assert that title was gained by it to the monies so deposited. Petitioner does assert that it would have obtained title to the sum just the same. The mere fact that thereafter the money was impounded by the Court would not alter the legal situation in the slightest degree. This is pointed out in the dissenting opinion of Mr. Justice Edmonds.

Counsel for the City and County, in attempting to answer petitioner's argument that it gained title to the fares collected by it has no answer to the proposition that if the money were stolen or destroyed by fire, the loss would fall upon petitioner and it would still have to refund the money to those who paid the excess fares, *admit that there is no answer to our point when the best they can do is to say that a mere custodian would be liable for negligence occasioning the loss of the fund.* But suppose there was no negligence! Can it be denied that petitioner would still be liable to respond to the cause of action of those who paid the excess fare? This must be so only because petitioner was the legal owner of all fares collected by it.

The final futile argument advanced by the City Attorney is that "it is by no means inconceivable that an absolute liability might be imposed upon petitioner as a custodian", and that "a custodian of money may enter into an obligation which binds him absolutely to pay and the obligation entered into by the petitioner appears to be of that nature". *Significantly, counsel fail to point to any obligation of such nature entered into by petitioner herein.*

THE BELL TELEPHONE CASE CANNOT BE DISTINGUISHED.

City and County of San Francisco, without success, has attempted to distinguish the case of *Illinois Bell Telephone Co. v. Slattery,* 102 Fed. (2d) 58, cited as authority for the proposition that petitioner herein was the legal owner of the fares collected by it during the time the order of the California Railroad Commission reducing petitioner's rate of fare from seven cents to six cents was held in abeyance by the stay order granted by the California Supreme Court, and that the relationship existing between petitioner and its passengers who had paid fares in excess of the rate fixed by said Commissioner was that of debtor and creditor. In both the cited cases and the case at bar provision was made in decrees of the respective Court that after the expiration of a certain time all further claims should be barred. The mere fact that in the *Bell Telephone* case it was provided in the decree that the utility was released from any claims which might be presented by the subscribers after the expiration of the limitation fixed does not affect the legal situation in any degree, because it was held by the Court that the subscribers, at the expiration of the limitation period, were not only without remedy to assert a claim, but the *debt owing by the plaintiff* was extinguished. No release was needed.

The essential part of that decision, which holds that the subscribers were not the owners of the fund or any part thereof, that they only had a claim for refund, and that the relation of debtor and creditor existed as between the utility and its subscribers, remains unchallenged.

It is also interesting to note that the industry of counsel for the City and County has produced no case which holds contrary to our position that petitioner became the owner of the money collected by it as fares from its passengers.

Further research on our part has brought to light a decision of this Court which sustains the legal proposition advanced in the petition herein that the company became the owners of the fares collected by it (including the amount later determined to be excessive) and that a cause of action arose in favor of the passenger to recover the excess charge. We refer to *A. J. Phillips Co. v. Grand Trunk Western Railway Company,* 236 U. S. 662, wherein this Court held:

> "When the overcharge was collected a *cause of action* at once arose, and the shipper at once had the right to file a complaint, or to intervene in proceedings instituted by others."

THE FINDING OF THE COURT BELOW THAT PETITIONER IS NOT THE OWNER OF THE FARES COLLECTED BY IT WHILE THE STAY ORDER WAS IN EFFECT IS NOT CONCLUSIVE UPON THIS COURT BECAUSE SUCH FINDING IS NOT SUPPORTED BY ANY SUBSTANTIAL EVIDENCE.

Counsel for City and County of San Francisco have contended in their brief (p. 15 and following) that this Court does not have jurisdiction to hear this cause because the Court below found that petitioner was not the legal owner of all fares collected by it while the stay order was in effect, and such determination is conclusive upon this Court.

We, however, contend that such finding or decision of the Court below is not based upon or supported by any substantial evidence, and that, such determination, in view of petitioner's claim of federal right, requires an examination of the record to ascertain if such ground of decision is broad enough or adequate to sustain the decision.

In the brief of City and County of San Francisco it is said (p. 16) that the theme of the present petition for writ of certiorari is that the Court below erred as to the determination of absence of property interest and that therefore the petitioner has been deprived of property without due process of law, and that:

> "There is, of course, no claim of a lack of procedural due process."

In making the statement quoted above counsel for City and County are in error. Petitioner contended in its petition that the ruling of the Court as to the property interest of petitioner in the excess fares is arbitrary and such ruling is unsupported by the evidence. A decision not based upon substantial evidence is invalid for lack of due process.

In the petition herein (p. 17) petitioner has urged that the California Supreme Court erred:

1. In holding that petitioner was not the legal owner of all moneys collected by it for the transportation of passengers during the time the operation of the order of the California Railroad Commission was suspended by the order of said Court.

2. In holding that petitioner had no legal ownership in the unclaimed excess charges by reason of a condition inserted in the stay order by the Court over the objections of petitioner, which was not required or authorized by Sections 67 and 68 of the California Public Utilities Act, and in holding that petitioner necessarily accepted the conditions of the order by acceptance of the stay.

The record is devoid of any evidence to sustain the two findings set forth in the specification of errors above quoted.

Where the existence of the alleged federal question itself depends upon a finding of fact, the Supreme Court will examine the facts to see whether the evidence adequately sustains the finding.

King v. Putnam Investment Co., 248 U. S. 23, 39 S. Ct. 15, 63 L. Ed. 102;

Truax v. Corrigan, 257 U. S. 312, 324, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375.

In *Fiske v. Kansas*, 274 U. S. 380, it was held that a state syndicalism act was applied to sustain the conviction of defendant without any charge or evidence that the organization in which he secured members advocated any crime, violence or other unlawful acts, and that as thus applied the act was an arbitrary and unreasonable exercise of the police power of the state, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the 14th Amendment. It was there said (p. 385):

"And this court will review the finding of facts by a State Court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." (Cases cited.)

In *Truax v. Corrigan,* 257 U. S. 312, this Court said:

"In cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. *If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here.*"

If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds.

Davis v. Wechsler, 263 U. S. 22.

The Supreme Court of the State of California has avoided deciding the oft asserted claim of petitioner herein that to take the unclaimed excess charges from it and to award the same to the City and County of San Francisco, or to the State of California, would be

to deprive it of its property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, by the mere statements that "Legal ownership is not a factor appearing in the present case" and "In the stay order it was recognized that the company should be entitled to the additional one cent for each fare collected pending review only if it prevailed and the Commission's order was annulled".

City and County of San Francisco now contends that since the Court below has found that petitioner was not the owner of the additional one cent collected by it as part of its fare of seven cents, that therefore petitioner could not be deprived of its property without due process of law because it had no property.

Whether the determination of the question of ownership be regarded as a finding of fact or a conclusion of law, in either event, if such finding of fact be not supported by the evidence in the record or such conclusion of law be predicated upon facts supported by evidence petitioner has not been afforded due process.

This Court has fequently held that it will review the findings of facts by a State Court where the Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.

Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655, 668.

In *Stanley v. Schwalby,* 162 U. S. 255, 274, 277-279, which was an action of ejectment, the validity of an authority exercised under the United States was drawn in question, and depended upon whether the United States had a good title to the land in controversy. That question turned upon whether the attorney for the United States, who represented it in the acquisition of the land, knew at the time of a prior deed to one McMillan, and the State Court found he had such knowledge. In the Supreme Court of the United States on writ of error to review the decision of the Court below it was insisted, on the one hand, that the finding was conclusive, and, on the other, that the evidence was insufficient, as matter of law, to warrant the finding, and could be examined to determine whether this was so. In that connection this Court, although recognizing the general rule that findings upon pure questions of fact are not open to review, said:

> "But so far as the judgment of the state court against the validity of an authority set up by the defendants under the United States necessarily involve the decision of a question of law, it must be reviewed by this Court, *whether that question depends upon the Constitution, laws, or treaties of the United States, or upon the local law, or upon principles of general jurisprudence.*"

Upon examining the evidence in the cited case, this Court held it to be "wholly insufficient, in fact and in law, to support the conclusion that the attorney had any notice of the previous deed to McMillan", and accordingly reversed the judgment of the State Court.

The rule enunciated above has found expression by this Court in many types of cases. For example, in *Schlemmer v. Buffalo, P. & R. Co.*, 205 U. S. 1, the case arose under the Federal safety appliance law, and the State Court found that the deceased contributed to his injury by his own negligence, thereby preventing a recovery. This Court exercised the power to examine the evidence, notwithstanding a contention that the finding was conclusive, and reversed the judgment upon the ground that it appeared that what had been found to be contributory negligence was at most an assumption of the risk, which was not a defense under the Federal statute.

Perhaps the most frequent exercise of this power occurs in cases arising under the clause of the Constitution forbidding a State to pass any law impairing the obligation of a contract, the existence of the contract in such cases being a mixed question of law and fact. In *Louisville Gas Co. v. Citizens' Gaslight Co.*, 115 U. S. 683, 697, a leading case upon this subject, it was said:

> "Whether an alleged contract arises from state legislation, or by agreement, with the agents of a state, by its authority, or by stipulations between individuals exclusively, we are obliged, upon our own judgment, and independently of the adjudication of the state court, to decide whether there exists a contract within the protection of the Constitution of the United States."

It is respectfully submitted that when due regard is had for the rule before indicated, and so often applied in so many different types of cases, it does not admit of doubt that in the case at bar this Court should examine

the entire record, which includes the only evidence which was received by the Court below, to determine whether the general finding that petitioner was not the legal owner of the fares collected by it during the pendency of the review proceedings necessarily involved the decision of questions of law bearing upon the right under the Constitution of the United States set up by petitioner herein.

In conclusion, it is further submitted that upon an examination of the record herein it will be clear that there is no evidence to sustain the finding of the Court below that petitioner was not the legal owner of the excess fares remaining in its hands after it had made refunds to all who applied for the same within the time allowed by the California Supreme Court for such action, and that in construing and applying the California Public Utilities Act in the manner set forth in its opinion, the Supreme Court of California deprived your petitioner of its property without due process of law contrary to the provisions of Section 1 of the 14th Amendment to the Constitution of the United States.

Dated, San Francisco, California,
December 4, 1946.

CYRIL APPEL,
IVORES R. DAINS,
Counsel for Petitioner.

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In the Supreme Court

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United States

OCTOBER TERM, 1946

No. 679

MARKET STREET RAILWAY COMPANY (a corporation),

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vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and FRANCK R. HAVENNER, C. C. BAKER, JUSTUS F. CRAEMER, RICHARD SACHSE and FRANK W. CLARK, the members of and constituting the Railroad Commission of the State of California,

Respondents.

ANSWER OF CITY AND COUNTY OF SAN FRANCISCO (RESPONDENT IN SUPPLEMENTARY PROCEEDING) TO PETITION FOR WRIT OF CERTIORARI.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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ANSWER OF CITY AND COUNTY OF SAN FRANCISCO (RESPONDENT IN SUPPLEMENTARY PROCEEDING) TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

FOREWORD.

In responding to the constitutional question raised by the petition for a writ of certiorari, we emphasize, at the outset, the purpose sought to be accomplished by the petition. By an adjudication that this fund is its property, and that it has been deprived thereof without due process of law, the petitioner would seek to profit by an illegal rate. The petitioner attempts to set at naught the following three decisions adjudicating that the rate which the petitioner collected was excessive and unlawful:

(1) The order of the Railroad Commission of the State of California reducing the fare charged on the petitioner's street car system from seven cents to six cents;

(2) The decision of the Supreme Court of the State of California upholding that order of the Railroad Commission;

Market St. Railway Co. v. Railroad Commission (1944), 24 Cal. (2d) 378, 150 Pac. (2d) 196;

(3) The decision of the United States Supreme Court in affirmance of the decision of the Supreme Court of the State of California;

Market St. Railway Co. v. Railroad Commission (1945), 324 U.S. 548, 65 S. Ct. 1020, 89 L. Ed. 1171.[1]

Thrice has the seven cent fare charged by the petitioner been declared an illegal exaction from its patrons. This fare was actually collected by the petitioner during the time herein involved and accomplished by means of a stay order of the Supreme Court of California. If successful in the present proceeding, the petitioner would achieve the startling consequence of retention by it of a large sum of money derived in entirety from a rate declared exorbitant, unreasonable and unlawful in the three adjudications to which we have referred.

THE FACTS.

It will be of aid to the Court to summarize the record more clearly than appears in the petition.

The Market Street Railway Company, the present petitioner, was since January 1, 1939, charging a street car fare in the sum of seven cents per ride upon its transportation system operated in the City and County of San Francisco. (Rec. 23).[2]

In a proceeding before the Railroad Commission of the State of California, it was determined by that body that the Market Street Railway Company was,

[1]Rehearing denied in 324 U. S. 890, 89 L. Ed. 1438.

[2]All references to the record are to the pages of the printed record on this application for certiorari.

through such fare, deriving a return in excess of a reasonable return. (Rec. 51). Accordingly, the Railroad Commission ordered that the fare be reduced to six cents. (Rec. 52-53).

In that proceeding, the City and County of San Francisco appeared and presented evidence in favor of such reduction of fare. (Rec. 20, 149-152).

After the order of the Railroad Commission, and as permitted by California Statute,

Public Utilities Act Sec. 67;
Stats. (Cal.) 1933 p. 1157;
App. to Pet. p. i;

the Market Street Railway Company, on January 20, 1944, filed a petition in the Supreme Court of the State of California to review that order of the Railroad Commission. (Rec. 1-13).

After the issuance of a temporary stay (Rec. 113-115), the Supreme Court of California, on March 8, 1944, issued an order staying the operation of the Railroad Commission order pending the determination of the proceeding. (Rec. 115-119). The order of stay required the issuance of coupons representing one cent to all persons paying the seven cent fare. (Rec. 118). It was further provided in the stay order that in the event of the affirmance by the Supreme Court of California of the order of the Railroad Commission, and in the event that the rate-payers do not claim refunds of the whole amount of the excess payments within six months after final decision of the Supreme Court of California, "the State (of Cali-

fornia) shall be entitled to all such excess charges or monies which petitioner has unsuccessfully attempted to refund, to be paid to it (the State) under such terms and conditions as the Court may hereafter prescribe." (Rec. 118). However, that order, at the conclusion thereof, contained the following reservation of jurisdiction (Rec. 119):

> "This Court retains jurisdiction to alter, amend, modify or supersede this order, on motion of either party, or on its own motion, as the interests of justice may require."

The Market Street Railway Company proceeded to collect the seven cent fare from the 29th of February, 1944 (the date of the initial stay order) until the 29th of September, 1944, the date of acquisition by the City and County of San Francisco of the operative properties of the Market Street Railway Company. (Rec. 167).

Thereafter, in the decisions we have referred to above, the Supreme Court of California and this Supreme Court of the United States both upheld the validity of the order of the Railroad Commission of California, and determined that the six cent fare was not unreasonable or confiscatory.

On April 28, 1945,[3] the City and County of San Francisco filed a petition for a modification of the

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[3]The date of the petition (April 27, 1945), but not the date of filing (April 28, 1945), appears in the printed record. The date of filing is correctly recited in the petition for writ of certiorari. (bottom of p. 15).

above mentioned stay order. (Rec. 149-158).[4] It is true, as noted in the Petition for Writ of Certiorari,[5] that this petition by the City and County of San Francisco sought payment to it of all of the impounded money constituting the difference between the seven cents charged and collected and the six cents determined by the Railroad Commission as a just and proper streetcar fare. However, the Supreme Court of California properly treated the petition of the City and County of San Francisco as praying, in any event, for the payment of the money remaining after refunds to rate-payers.

It is important to note that this petition of the City and County of San Francisco was filed before any definite refund period came into effect.

The mandate from the United States Supreme Court affirming the judgment and decision of the Supreme Court of California (which, in turn, affirmed the order of the Railroad Commission) was received in the Supreme Court of the State of California and spread upon its minutes on the 7th day of May, 1945.

In an order of May 31, 1945, the Supreme Court of California made provision for the steps to be taken by the Market Street Railway Company in the refunding to the streetcar riders of the excess in fare collected by the company during the period of the stay order. (Rec. 164-167). In this order, likewise,

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[4]The details of that petition will hereinafter be presented. (*Infra*, p. 9).

[5]Bottom of p. 15.

there was a reservation of further jurisdiction as to the determination of the person or persons to be ultimately awarded the money remaining on hand after refunds to the couponholders. That order, at the conclusion thereof, provides as follows (Rec. 167):

> "The Court retains jurisdiction to modify this order and to make such further order in this matter as may be deemed necessary or desirable."

The time during which refunds were to be made to the persons paying the excess fares expired December 31, 1945. (Rec. 174).

In addition to the City and County of San Francisco, the Market Street Railway Company filed a petition for the payment to it of the excess money remaining on hand after refunds to the ratepayers. The Market Street Railway Company petition was filed May 9, 1945 (Rec. 162) after the opinion of this United States Supreme Court became final. By briefs and oral argument, the State of California resisted both petitions, claiming that it was the lawful recipient of the fund. (Rec. 175).

The last-mentioned contention need not here be considered. The State of California has accepted the decision of the Supreme Court of the State of California, providing for the payment of this money to the City and County of San Francisco, and has not petitioned for a writ of certiorari.

In petitioner's statement of the case, reference is made to an affidavit to the effect that the petitioner sustained an operating loss during the time herein

involved, after setting up a reserve for the refund of fares. (Pet. top of p. 16).

This is best answered by the comment of the Supreme Court of California to the effect that the stay order obtained by the Company prevented the six cent fare from going into effect; in the words of the Supreme Court of California, if the reduction of fare, as provided for by the order of the Railroad Commission, be considered experimental, the experiment was never tried. (Rec. 178; 171 Pac. (2d) 879). It could be well and successfully argued that with the added impetus of business to be derived by a six cent fare considerably greater revenue would have been gained by the Market Street Railway Company than under the seven cent fare. The Market Street Railway Company was at the time of the Railroad Commission order in active competition with the Municipal Railway System owned and operated by the City and County of San Francisco, with the latter charging a five cent fare. (Rec. 23).

As the Supreme Court of California also indicates, there is serious question as to the accuracy of the financial statement of the petitioner. (Rec. 178; 171 Pac. (2d) 879).

In substance, the petitioner is making an awkward attempt to assail the decisions both of the State of California and of this Supreme Court of the United States holding that the newly-established rate was not confiscatory. Inasmuch as the petitioner submits no argument upon this affidavit, we make no further comment.

THE PETITION OF THE CITY AND COUNTY OF SAN FRANCISCO.

The petition of the City and County of San Francisco recited the acquisition by the municipality of the operative properties of the Market Street Railway Company, the dilapidated condition of the equipment and the intention of the municipality to utilize this fund, if awarded to it, toward the rehabilitation of the system. (Rec. 149-158). Attached to the petition as an exhibit was a copy of a resolution of the legislative body of the municipality to the effect that this money, if paid to the City, would thus be utilized. (Rec. 154-155). There was no denial of the allegations of the petition and the same stood as admitted.

THE DECISION OF THE SUPREME COURT OF CALIFORNIA.

The majority opinion, participated in by five of the seven members of the Supreme Court of California, appears at page 173 of the record.

It is reported as follows:

> *Market Street Railway Company v. Railroad Commission,* 28 A.C. 387,[6] 171 Pac. (2d) 875.[7]

Such opinion is to the effect that the City and County of San Francisco is equitably entitled to this fund and that this fund was not the property of the

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[6]Advance Sheets of the California Supreme Court decisions.
[7]Advance Sheets of the Pacific Reporter (Second Series), Vol. 171 Pac. (2d) Number 4.

Market Street Railway Company. To award the fund, the Court concluded, to the municipality in effect placed the money back in the pockets of the people who created it, the residents of the municipality who paid the excess fare.[8]

This analysis of the substance of the decision is supported by the following excerpts from the opinion of the Supreme Court of California in the matter at bar:

(1) As to the absence of ownership in the fund by the Market Street Railway Company, it was ruled (171 Pac. (2d) at p. 878, bottom of column 2; Rec. 176-177):

> "Legal ownership is not a factor appearing in the present case. The Railroad Commission's order limited the fare to be collected to a six cent base. In the stay order it was recognized that the company should be entitled to the additional one cent for each fare collected pending review only if it prevailed and the commission's order was annulled. That the company should have no legal ownership in the excess in the event of affirmance was recognized in the stay order, namely, in the purpose to prevent loss to the company if the order should be annulled, and in the further provision for refund and disposition of the excess otherwise than to the company in the event of affirmance. The company necessarily accepted the conditions of the order by acceptance of the stay

[8]The affidavit of Paul L. Beck attached as Exhibit B to the Petition of the City and County of San Francisco, and uncontroverted, was to the effect that only 12.82 per cent of the passengers upon the street cars of the Market Street Railway Company were nonresidents of San Francisco. (Rec. 157-158).

(Inland Steel Co. v. United States, supra, 306 U.S. 153, 156, 59 S.Ct. 415, 83 L.Ed. 557), and, in view of affirmance by this court and by the Supreme Court of the United States, it may not now win an amount on a claim of legal ownership to which it was never entitled either under the commission's order or the stay order of this court. Both this court and the Supreme Court of the United States have determined that the company has been accorded due process. It follows that the company was and is not entitled as of right to more than the six cent fare ordered by the commission."

(2) As to the substantial equity in favor of the municipality, it was ruled (171 Pac. (2d) at p. 881, middle of column 2; Rec. 181-182):

"It thus appears that the showing of equity in favor of the city is particularly persuasive in view of the fact that the people of the city, who were for the most part the contributors to the fund, have now acquired the properties furnishing the service and are now responsible to the public for their operation. They are now interested in those properties in a proprietary as well as in a consumer capacity. In this respect they are doubly affected by the disposition of the unrefunded excess fares.

"The transportation problems involved in this entire proceeding are essentially the city's problems. The people of the city are those principally concerned with their solution. The payment of the excess fares was made by them and their claim that the unrefunded balance be made available for improvement in the service is convinc-

ing. The city felt called upon to acquire the Market Street Railway System in such an outmoded and depreciated condition that it would require a vast expenditure of money to put it in repair and keep it in operation. The fund here involved was accumulated by what has been determined to be an unlawful exaction from the patrons of that system. In equity and good conscience it would seem that the fund should be made available for the benefit of those who were compelled to submit to this unlawful exaction even though most of them deemed it unnecessary or inconvenient to pursue the refunds, small individually, but very substantial in the aggregate. The individual refunds averaged about $2.00 and were made only on written application of the claimant under oath at the office of the company. Equitable considerations dictate that the people of the city, who contributed the moneys and who now own and operate the properties which furnished the service when the excess fares were paid, are entitled to have them distributed for their benefit in the rehabilitation of the physical properties which were acquired during the pendency of the review proceeding, and for the improvement of the service afforded thereby. The distribution of the fund in that manner and its application to the purpose specified will inure to the benefit of those whose payments accumulated the fund, including both the people of the city and outsiders who have occasion to avail themselves of the service.

"We therefore conclude that the equities urged by the city should be deemed paramount. Accordingly, its application for modification of the stay order is granted."

ARGUMENT.

I.

THE SUPREME COURT OF CALIFORNIA WAS EMPOWERED TO DETERMINE THE OWNERSHIP OF THE FUND IN CONFORMITY WITH EQUITABLE PRINCIPLES.

Throughout the litigation, the jurisdiction of the Supreme Court of California has been equitable in nature.

Southern California Edison Co. v. Railroad Commission, 6 Cal. (2d) 737, 744-748.

The proceeding involved in

United States v. Morgan (1938), 307 U.S. 183, 83 L.Ed. 1211, 59 S.Ct. 795,

is in all respects similar to that at bar. That case concerned money collected in excess of a charge determined upon by the Secretary of Agriculture under the Packers and Stockyards Act. The Supreme Court of the United States had this to say (307 U.S. at p. 191, 83 L.Ed. at p. 1217, 59 S. Ct. at p. 800):

> "* * * the district court sitting as a court of equity,[9] and in exerting its extraordinary powers to stay execution of a rate order, and in directing payment into court of so much of the rate as has been found administratively to be excessive, it assumes the duty of making disposition of the fund in conformity to equitable principles."

Further, the Court stated (307 U.S. at p. 193; 83 L.Ed. at p. 1218, bottom of col. 2):

> "In taking the payments into custody it acted as a court of equity, charged both with the responsi-

[9]Omitting citations.

> bility of protecting the fund and of disposing of it according to law, and free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result. It entered into no contract or understanding with the litigants; it entered into no undertaking as to the manner of disposing of the fund; its duty with respect to it is that prescribed by the applicable principles of law and equity for the protection of the litigants and the public, whose interests the injunction and the final disposition of the fund affect."[10]

We speak throughout of the existence of a fund. Even though the money remains in the hands of the utility, with securities deposited in lieu of physical payment into court, the same power and jurisdiction is possessed as if the money were actually on deposit in court.

> *Natural Gas Pipeline Co. v. Federal Power Commission* (C. C. A. 7, 1942), 128 Fed. (2d) 481, 485.

The foregoing case is cited in the opinion of the Supreme Court of California upon the above principle. (171 Pac. (2d) 878; Rec. 176). The doctrine is not questioned by the petitioner.

It is also the rule that an Equity Court, in control of a fund, may adjudicate the rights of persons claiming interests in the fund, although such persons were not originally parties to the action.

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[10]Emphasis throughout is ours.

Natural Gas Pipeline Co. v. Federal Power Commission (C.C.A.7, 1942) (*Supra*), 128 Fed. (2d) 481, 484 (bottom of column 2):

"Where in the progress of a suit in the United States Court, property has been drawn into custody and control, persons claiming interest in or liens upon the property may be permitted to come into court to protect and enforce their claims, even though the court could not have considered or adjudicated their claims if it had not originally impounded the property."[11]

The foregoing cases involved, specifically, proceedings over impounded funds paid in during the pendency of litigation attacking a rate. These decisions effectively answer the petitioner's contention that the City and County of San Francisco has no status in this proceeding. (Pet. p. 31).

II.

A DECISION OF A STATE COURT—THAT A PERSON HAS NOT A PROPERTY INTEREST—IS ORDINARILY AND IN THIS INSTANCE REGARDED AS CONCLUSIVE BY THE SUPREME COURT OF THE UNITED STATES.

We have heretofore called attention to the substance of the decision of the Supreme Court of California. It is in essence that the Market Street Railway Company has no property interest in this fund and that the same equitably should be awarded to the City and County of San Francisco.

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[11]Citing authorities.

The theme of the present petition for a writ of certiorari is that the Supreme Court of California erred as to this determination of absence of property interest and that therefore the petitioner has been deprived of property without due process of law. There is, of course, no claim of a lack of procedural due process. The petitioner's present arguments as to ownership were all advanced and considered in the Supreme Court of the State of California. The petitioner goes no further than to claim that the State court of highest resort erred in its holding on the issue of a property in the fund.

Of course, if such claim of error is sufficient support for a petition for a writ of certiorari, there would be a limitless parade of cases before this court, wherever litigation involves asserted property rights and this court to boundless extent would be sitting as a court of review over the appellate courts throughout the nation. A true conception of this court's jurisdiction prevents this result.

> *Fox River Paper Company v. Railroad Commission of Wisconsin* (1926), 274 U.S. 651, 71 L.Ed. 1276 (affirming the decision in 208 N.W. 266, 189 Wis. 626).

A statute of the State of Wisconsin placed supervisory power in the State Railroad Commission over dams in navigable streams and granted the right to that body to issue or withhold licenses for the erection of such structures. The plaintiffs in error who were riparian owners and who had been denied a license filed a proceeding to review the order of the

Railroad Commission. They contended that as riparian owners they had an absolute property interest, subject to proper regulation by the State. It was held in the State Court that there was no such property interest.

The Supreme Court of the United States affirmed the judgment. This Court held that, in the absence of any evasion of the constitutional issue on the part of the State court, that court's determination that there was no property interest was conclusive. In this connection, it was stated (274 U.S. 657; 71 L. Ed. 657):

> "We are not concerned with the correctness of the rule adopted by the state court, its conformity to authority, or its consistency with related legal doctrine. It is for the state court, in cases such as this, to define rights in land located within the state, and the 14th Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be non-existent.
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> "We accept as conclusive the state court's view of the nature of the rights of riparian owners. We therefore find in the refusal of the Commission to grant the permit no denial of the property rights of plaintiffs, and hence no violation of the 14th Amendment."

It is equally true, in the case at bar, that the Supreme Court of California has ruled that this petitioner, Market Street Railway Company, has no property interest in this impounded fund. That there

has been no attempt to "forestall" the determination of the constitutional question will be demonstrated by a showing of the thorough reasonableness of that court's conclusion. (*Infra*, p. 21).

Similarly, in

Sauer v. City of New York (1906), 206 U.S. 536, 51 L.Ed. 1176, 27 Sup.Ct.Rep. 686,

the courts of the State of New York held that a property owner had no easement for light, air or access precluding the erection of a viaduct for general vehicular purposes over a street adjoining his property. The Supreme Court of the United States announced that it was bound by the determination of no property interest upon the part of the state court, saying (206 U.S. 546; 71 L.Ed. 1181, middle of column 2):

> "But, as has been said, we are not concerned primarily with the correctness of the rule adopted by the court of appeals of New York and its conformity with authority. This court does not hold the relation to the controversy between these parties which the court of appeals of New York had. It was the duty of that court to ascertain, declare and apply the law of New York, and its determination of that law is conclusive upon this court. This court is not made, by the laws passed in pursuance of the Constitution, a court of appeal from the highest courts of the states, except to a very limited extent, and for a precisely defined purpose."

The opinion then proceeds to set forth the elementary rule that the Supreme Court of the United

States limits itself, in review of state court decisions, to constitutional questions and that where a state court has adjudicated that no property interest exists that holding will be adhered to in the Supreme Court of the United States. The contention that there has been a deprivation of property without due process of law is thus conclusively answered.

Numerous cases are in accord, holding that the issue as to whether or not a property interest exists is one for the state courts. A further case on this subject which reviews a number of others to the same effect is

Tracy v. Ginzberg (1906), 205 U.S. 170, 27 S. Ct. 461, 51 L.Ed. 755.

Here, the plaintiff sued in the State Court claiming a sum of money which the defendant, a trustee in bankruptcy, had derived from the sale of a liquor license. The plaintiff asserted that the bankrupts were not the owners of the license but that he (the plaintiff) was the actual owner thereof. The State Court denied relief to the plaintiff. In answer to the contention that, through this decision, there had been a deprivation of property without due process of law, the Supreme Court of the United States, per Mr. Justice Harlan, stated (205 U.S. at p. 174, 51 L. Ed. 759, bottom of column 2):

> "The plaintiff also insists that by the judgment of the supreme judicial court of Massachusetts he has been deprived of his property without the due process of law guaranteed by the 14th Amendment of the Constitution of the United States. This proposition is without merit. Within the

meaning of that Amendment, the court, by its judgment, did not deprive the plaintiff of property without due process of law. He sought a decree adjudging that he was entitled to the money received by Ginzberg from O'Hearn. The court, proceeding entirely upon principles of general and local law, and giving all parties interested in the question an opportunity to be heard, decided that plaintiff had no right to that money. The decision of a state court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property. If we were of opinion, upon this record, that the money received by Ginzberg from O'Hearn really belonged to Tracy,—upon which question we express no opinion,—still it could not be affirmed that the latter had, within the meaning of the Constitution, and by reason of the judgment below, been deprived of his property without due process of law. Under the opposite view every judgment of a state court involving merely the ownership of property could be brought here for review,—a result not to be thought of. The 14th Amendment did not impair the authority of the states, by their judicial tribunals, and according to their settled usages and established modes of procedure, to determine finally, for the parties before them, controverted questions as to the ownership of property, which did not involve any right secured by the Federal Constitution, or by any valid act of Congress, or by any treaty. Within the meaning of that

Amendment, a deprivation of property without due process of law occurs when it results from the arbitrary exercise of power, inconsistent with 'those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.'" (Citing authorities)

III.

UPON LOGICAL GROUNDS, THE SUPREME COURT OF CALIFORNIA HAS HELD THAT THIS PETITIONER IS NOT ENTITLED TO THE FUND AND HAS NO PROPERTY INTEREST THEREIN.

We are not unmindful of the exception incorporated in the extracts from the foregoing authorities. There must be no attempt to "forestall" a decision on the constitutional question by this Court. In other words, there must be no arbitrary adjudication of no property interest, as a pretext for an invasion upon constitutional principles.

The decision under review does not fall within such exception. It presents a sound line of reasoning logically pointing to the conclusion reached by the court. Indeed, under the foregoing authorities, even if this court feels that a contrary conclusion would be reached, were this court itself to determine the issue as to whether the petitioner possessed a property in-

terest, the adjudication of the state court upon that subject would still be considered determinative.

The criticisms of the petitioner go no further than in an attempt to obtain an appellate review upon the merits. This, as we have seen, cannot be accomplished. However, we deem it fitting to reply to petitioner's points upon the merits, so that this court will be satisfied that the proceeding has been decided in good faith and with no attempt to "forestall" the decision of any constitutional question. That is the only possible test that the City and County of San Francisco is called upon to meet. The following discussion will, in our judgment, go even to the length of establishing that the Supreme Court of California has correctly decided the property question—assuming that such were the test we were called upon to meet.

The petitioner maintains that its property is being taken without due process of law because the fund with which we are concerned was its property ever since its appearance in the various fare boxes maintained by the petitioner. (Pet. top of p. 23). We take issue with the assertion that the one cent excess in fare ever became the property of the petitioner. Petitioner's claim of ownership is based upon the fact that it succeeded in obtaining possession of the money. Thus, the petitioner argues that it was "legally authorized * * * to continue to collect seven cents" and that it cannot be maintained that because of any illegality "petitioner did not gain title to the entire fare collected by it." (Pet. middle of p. 23).

This is nothing more nor less than an argument that since the petitioner, by means of the stay order, got its hands upon the money, such money thereupon, through mere possession, became its property. That such argument is specious permits of no doubt. The stay order was a privilege permitted by statute and was extended by the Supreme Court of California in its discretion, for the preservation of the status quo, and at the request of the Market Street Railway Company. The petitioner was not entitled as a matter of right to a stay. The Statute goes no further than to provide that a stay, upon a petition for a writ of review of an order of the Railroad Commission determining a rate, "may" be issued by the Supreme Court of California in its discretion.

Public Utilities Act, Section 68, Subdivision (a);
Stats. (Cal.) 1933, p. 1158;
App. to Pet. p. ii.

It is plain, therefore, that when the petitioner took possession of the excess in fare, during the operative period of the stay order, it did so as a mere custodian.

The petitioner argues that "from the very nature of the transaction", in the payment of a seven cent fare, "it was impossible for six cents out of each fare to become the property of the carrier and one cent of each fare to remain the property of the passenger" and that the passenger received but an evidence of such payment. (Pet. bottom of p. 23 and top of p. 24). Apparently, the petitioner contends that since the passenger did not retain title to the one cent, it

follows that the petitioner obtained title. This, of course, is a *non sequitur*. It is far sounder to state that the petitioner retained possession of the one cent as a mere custodian for delivery to the person or persons ultimately decreed to be the equitable owners thereof.

It is expressly provided in

Public Utilities Act, Section 68, subdivision (d);

Stats. (Cal.) 1933, p. 1159;

App. to Pet. p. v;

that in the event any stay order is issued, the company may be required to pay into court, or to a bank or trust company, "from time to time" the excess money so collected during the period of the stay.

Therefore, had it seen fit to do so, the Supreme Court of California could have required the petitioner to deliver, day by day, the monies derived from the excess in fare to be impounded with the Court's own subordinate and physical custodian. Had such a provision been incorporated in the order of stay and complied with, not even the petitioner would be bold enough to assert that title was gained by it to the excess monies so deposited. However, for the petitioner's convenience, it was permitted to retain the monies and deposit with the Court, in lieu thereof, the required securities.

That this is in all respects to be treated as a fund impounded in the physical custody of the court has been previously demonstrated. (*Supra,* p. 14).

The petitioner argues that the fund became its property because if it were stolen or destroyed by fire the loss would have fallen upon the utility. (Pet. top of p. 24). Nothing would be accomplished by a prolonged discussion of such hypothetical case. Suffice it to say that the petitioner, in any event, and as a mere custodian, would be liable under California law for negligence occasioning the loss of the fund.

Dieterle v. Bekin (1904), 143 Cal. 683, 688, 77 Pac. 664, 666.

Moreover, it is by no means inconceivable that an absolute liability might be imposed upon the petitioner as a custodian, since it elected to obtain a stay order and further elected to retain the fund and deposit securities in lieu thereof instead of bringing out the money to the Supreme Court day by day. It is also well settled under California law that a custodian of money may enter into an obligation which binds him absolutely to pay and the obligation entered into by the petitioner appears to be of that nature.

Barrere v. Somps (1896), 113 Cal. 97, 104, 45 Pac. 177, 179;

Klein v. Baker (1931), 112 Cal. App. 157, 162, 296 Pac. 631, 633;

Transcontinental & Western Air v. Bank of America (1941), 46 Cal. App. (2d) 708, 717, 116 Pac. (2d) 791, 796.

To suggest a holding of liability upon the part of the company in the event of loss by fire or theft does not, therefore, point to the conclusion that the company must have had title.

We submit that nothing has been offered in the petition tending to establish that the petitioner ever acquired title to this fund. The convincing line of reasoning of the Supreme Court of California has not been overcome—to the effect that the petitioner cannot be considered as having gained ownership in money collected in the exaction of an illegal rate.[12]

IV.

RESPONSE TO THE PETITIONER'S CONTENTION THAT THE DECISION OF THE SUPREME COURT OF CALIFORNIA IS NOT AUTHORIZED BY ANY STATUTE OF THE STATE OF CALIFORNIA.[13]

The Supreme Court of California has pointed to the special provision in the California Statutes to the effect that a fund of this type is payable to the State in an instance where a toll-bridge company has money left on hand after refunds of an excess over a lawful rate. (*Market St. Ry. Co. v. Railroad Commission,* 171 Pac. (2d) 880, middle of column 1; Rec. 179). As the Court remarks, this indicates the legislative policy that the State should be the natural beneficiary where the utility serves the people of the State generally as occurs with a toll-bridge company.

Also noted in the decision of the Supreme Court of California is the deletion by the legislature of Cali-

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[12]*Supra,* pp. 10-11.
[13]Pet. pp. 25-30.

fornia in 1933, with references to utilities generally, of the provision that the unrefunded excess shall go to the State. (171 Pac. (2d) 879, bottom of column 1; Rec. 179).

The Supreme Court of California has therefore held, and we think quite properly, that the State law is silent as to the disposition of the unrefunded excess accumulated pending final disposition of litigation attacking a rate-fixing order. The Court has consequently reached the conclusion that the disposition of such fund is subject to the sound discretion of the court under the rule of

United States v. Morgan, 307 U.S. 183, 194, 59 S.Ct. 795, 83 L.Ed. 1211. (*Supra,* p. 13).

This conclusion is manifestly sound.

The various sections of statute reviewed in the petition (pp. 25-30) have nothing to do with the money remaining after refunds. Specific comment as to each section is therefore unnecessary, and would unduly prolong this reply.

That this construction of the state statute must remain as the law of this case and that such construction, even though erroneous, affords due process is well-settled by a long line of decisions of this Supreme Court of the United States.

Neblett v. Carpenter (1938), 305 U.S. 297, 83 L.Ed. 182, 59 S.Ct. 170

is a recent example of the application of this rule. The Insurance Commissioner of the State of Cali-

fornia there instituted a proceeding for the rehabilitation of an insolvent insurance company.

Stats. (Cal.) 1935, p. 540.

It was contended that, by reason of the construction of certain statutes by the Supreme Court of California, the petitioners for certiorari, who were policy holders, were deprived of property without due process of law. This was the answer of the Supreme Court of the United States in the certiorari proceeding (305 U.S. at p. 202; 83 L. Ed. 187, middle of column 2):

> "All of these holdings concern matters of state law and amount at most to alleged erroneous constructions of the State's statutes by its own court of last resort. Such decisions would not be a denial of the due process guaranteed by the Fourteenth Amendment. We are, therefore, without jurisdiction to review the state court's decision of any of these questions."

There are numerous decisions of the United States Supreme Court in accord with the above and holding that a construction of a state statute, or a decision upon a question of state law, however erroneous, cannot be attacked on *certiorari.*

Arrowsmith v. Harmening, 118 U.S. 194, 196, 30 L.Ed. 243, 6 S.Ct. 1023;

Central Land Co. v. Laidley, 159 U.S. 103, 112, 40 L.Ed. 91, 94, 16 S.Ct. 80;

Iowa C.R. Co. v. Iowa, 160 U.S. 389, 393, 40 L.Ed. 467, 469, 16 S.Ct. 344;

West v. Louisiana, 194 U.S. 258, 261, 48 L.Ed. 965, 968, 24 S.Ct. 650;
McDonald v. Oregon R. & Nav. Co., 233 U.S. 665, 669, 58 L.Ed. 1145, 1148, 34 S.Ct. 772;
McCaughey v. Lyall, 224 U.S. 558, 564, 56 L.Ed. 883, 885, 32 S. Ct. 602;
Enterprise Irr. Dist. v. Farmers Mutual Canal Company, 243 U.S. 157, 165, 61 L.Ed. 644, 649;
Nickel v. State of Nevada (1921), 256 U.S. 222, 65 L. Ed. 900;
American R. Express Co. v. Kentucky, 273 U.S. 269, 273, 71 L.Ed. 639, 641, 47 S.Ct. 353.

V.

THE AUTHORITIES RELIED UPON BY THE PETITIONER DO NOT SUSTAIN ITS POSITION.

We have heretofore observed[14] that even an erroneous decision, either upon general principles of law or in construction of a statute, is not sufficient to raise a constitutional question upon the due process clause. However, the citations in the petition may also be disposed of upon the merits.

Illinois Bell Telephone Co. v. Slattery (C.C.A. 7, 1939), 102 Fed. (2d) 58 (Pet. pp. 18-21) does not pass upon a controversy analogous to that at bar. It is true that that case concerned excess money remaining after refunds to rate-payers but there the

[14] *Supra,* p. 28.

similarity to the case at bar begins and ends. The claimants there were only the State and the utility. No equity comparable to the one possessed by the City and County of San Francisco in the matter at bar was there advanced by the State. The basis of the State's claim in that case was solely upon *bona vacantia,* or abandoned property, escheating to the State. It was held that the common law doctrine concerning such property was not part of the law of Illinois. The Court therefore held that the fund should be awarded to the utility—the only other claimant to the fund—inasmuch as there was a definite provision in the course of the proceeding for the release of the utility after the termination of the refund period. In the case at bar, there was no provision for such release, and the Supreme Court of California, on both appropriate occasions, consistently retained jurisdiction to determine the ultimate recipient of these unclaimed funds.

The above ground of distinction is definitely pointed to by the Supreme Court of California in the instant decision. (171 Pac. (2d) 878; Rec. 176). The petition is not addressed to the line of demarcation thus drawn by the Supreme Court of California.

Moreover (at p. 68 of 102 Fed. (2d), top of column 2), the decision in the cited case was based precisely upon the ground that when the State made claim the refund period had expired. In reaching its determination, the Court said (102 Fed. (2d) at p. 68, middle of column 2):

"* * * when the state made claim there was no longer a debt in existence."

As we have heretofore noted, the City here made timely claim, in that its petition was interposed prior to the commencement of the refund period.

Pacific Gas & Electric Co. v. Railroad Commission (Dist. Ct. Cal.), 16 Fed. Sup. 884

is also cited by the petitioner. (Pet. p. 21). In this case, it was decreed that the rate-fixing order was void. Of course, the impounded money under that circumstance belonged to the utility.

In the companion suits of

Northern Union Gas Co. v. Mayer (Circ. Ct. N. Y. 1909), 171 Fed. 602

and

Standard Gas Light Co. v. Mayer (Circ. Ct. N. Y. 1909), 171 Fed. 604 (Pet. pp. 21-22),

there was no claimant to the unrefunded excess other than the utility.

Thompson v. Consolidated Gas Utilities Corp. (1937), 300 U. S. 55, 81 L.Ed. 510 (Pet. p. 37)

is far afield. The administrative order there held unconstitutional was one which pro-rated the production of natural gas and which was not designed to prevent waste but was, on the other hand, made for the purpose of compelling certain producers to purchase gas from others in order to fulfill their contracts.

At page 11 of the petition, a number of authorities are cited, to the effect that a non-federal ground may be so interwoven with a federal ground as not to

defeat an application for a writ of certiorari. The difficulty of the petitioner's position is that no true federal ground is here interposed.

The petitioner also argues, upon the basis of authority, that a state will not interfere for the benefit of persons holding private rights and the petitioner contends that this doctrine likewise applies to a municipality. However, these authorities do not concern a direct ownership by a state or municipality in utility property as in the manner here, with a consequent equity inhering in its favor as a representative of persons creating the fund.

VI.

THERE IS NO SHOWING OF AN IMPAIRMENT OF AN OBLIGATION OF CONTRACT.

In vague manner, and without citation of authority, the petitioner asserts that it was discharged "from any and all obligations of the operating permit" by virtue of the contract of sale to the City. (Pet. pp. 35-37). Of course, this has nothing to do with the impounded fund which the petitioner held merely as a custodian. The terms of the operating permit are not set forth by the petitioner and we are unable to conceive any theory by which the asserted right to retain this fund is in any way connected with the operating permit or a release of the obligations under which the petitioner held the operating permit.

It is undoubtedly true that in negotiation over the purchase price of the properties of the petitioner an obligation of the petitioner under the terms of the

operating permit was surrendered. But this is entirely unconnected with the possession of funds by the petitioner gained from an unlawful rate.

The petitioner in effect argues that under construction and application of the state statute by the Supreme Court of California, the petitioner's contract of sale to the City has been impaired. This, as a ground for review by certiorari, is definitely rejected by numerous decisions of this Supreme Court of the United States. Many of the cases are reviewed in

Central Land Company v. Laidley (1894), 159 U.S. 103, 110, 40 L.Ed. 91, 94,

where it was claimed that an erroneous construction by the Supreme Court of Appeals of West Virginia of a statute prescribing the form of acknowledgment of a married woman impaired the obligation of a contract evidenced by a certain deed. The Court stated (159 U.S. at p. 110, 40 L.Ed. at p. 94, middle of column 2):

> "The appellate jurisdiction of this court, upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the Constitution of the United States has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court. The statute of West Virginia is admitted to have been valid, whether it did or did not apply to the deed in question; and it necessarily follows that the question submitted to and decided by the state court was one of construction only, and not of validity. If this court were to assume jurisdiction of this case, the question submitted for its

> decision would be not whether the statute was repugnant to the Constitution of the United States, but whether the highest court of the state has erred in its construction of the statute. As was said by this court, speaking by Mr. Justice Grier in such a case, as long ago as 1847, 'It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary.' Commercial Bank of Cincinnati v. Buckingham, 46 U.S. 5 How. 317, 343 (12:169, 181); Lawler v. Walker, 55 U.S. 14 How. 149, 154 (14:364, 366)."

Various cases along the same line are set forth in the decision.

CONCLUSION.

We therefore urge:

(1) The Supreme Court of California had full equitable powers in determining to whom the fund should be paid.

(2) The decision of the State court that this petitioner did not have a property interest in the fund is to be adhered to in the Supreme Court of the United States.

(3) The Supreme Court of California has logically and reasonably held that the Market Street Railway Company was not entitled to the fund.

(4) This Court will follow the construction of the Statutes of California by the Supreme Court of California in its holding that the Statutes of California are silent as to the manner in which this fund is to be distributed and that, therefore, the Court possesses power to exercise its equitable discretion.

(5) Finally, we respectfully urge that, as the Railroad Commission of California, the Supreme Court of California and the United States Supreme Court all have held, the Market Street Railway Company was not entitled to the differential in streetcar fares between six cents and seven cents. Upon sound reasoning, the Supreme Court of California, in the opinion now subjected to attack, has ruled that the fund be turned over to the City and County of San Francisco, to be used for the rehabilitation of the transportation system that the City now owns, for the benefit of the car-users who created the fund. No reason for the granting of a writ of certiorari in review of this decision appears.

Dated, San Francisco, California,
November 27, 1946.

Respectfully submitted,

JOHN J. O'TOOLE,
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DION R. HOLM,
Counsel for Public Utilities Commission,

Counsel for Respondent,
City and County of San Francisco.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 679

MARKET STREET RAILWAY COMPANY
(a corporation),
Petitioner,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, FRANCK R. HAVENNER, C. C. BAKER, JUSTUS F. CRAEMER, RICHARD SACHSE and FRANK W. CLARK, the members of and constituting the Railroad Commission of the State of California,
Respondents.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Comes now Market Street Railway Company, petitioner, and respectfully prays for a reconsideration by the Court of its order entered December 16, 1946, denying certiorari herein, and upon such reconsideration that said order denying certiorari be vacated and writ of certiorari be granted.

It was shown in the petition for writ of certiorari herein that this Court has jurisdiction to review the judgment of the Supreme Court of the State of California entered in this cause on June 18, 1946, whereby your petitioner was ordered to pay to the City and County of San Francisco the sum of $688,751.58 as a condition for the return to petitioner of United States securities of a face value of $600,000 and the exoneration of the surety on petitioner's bond of $100,000. Abundant authority was cited in the petition herein to sustain the jurisdiction of this Court, and no authority has been cited to the contrary.

This is a plain case where the Court below, in the rendition of its final judgment, has construed Sections 67 and 68 of the California Public Utilities Act to empower it to take money legally collected by a public utility as compensation for services rendered by it and to award such money to a municipal corporation which had paid no part of the money and was not acting as the authorized agent, assignee, or trustee of any person who had paid any part of said sum.

Although we believe the construction so placed upon the statute by the California Supreme Court is definitely erroneous, arbitrary and unreasonable, nevertheless, it is our understanding that under a long line of decisions of the Supreme Court of the United States the construction of a state statute and the meaning to be attributed thereto will be considered as binding upon this Court, although it may consider such construction to be erroneous or pure judicial legislation.

Hence, for the purpose of this cause, we must consider the above mentioned sections of the California Public Utility Act, *as so construed,* to have been enacted by the Legislature of the State of California, and the impact of such legislation upon private rights as State action.

In *Ward v. Krinsky,* 259 U.S. 503, this Court said:

> "In the exercise of our appellate jurisdiction we are bound by the construction of the state law adopted by its court of last resort; hence, for present purposes it must be taken as settled that the legislature intended the Compensation Law, as amended, to apply to an employee in Krinsky's situation, precisely as if it were so declared in the words of the statute. Our function is confined to determining whether, as so construed and as applied to the concrete facts of the case, the statute contravenes the limitations imposed by the 14th Amendment upon state action."

The prohibitions of the 14th Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation

by the state, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.

Chicago, B. & Q. R. Co. v. City of Chicago, 166 U. S. 226;

Ex parte Virginia, 100 U. S. 339, 346, 347;

Scott v. Neale, 154 U. S. 34.

"But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. *In determining what is due process of law regard must be had to substance, not to form.* This court, referring to the 14th Amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' Davidson v. New Orleans, 96 U.S. 97, 102. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirements of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that Amendment."

C. B. & Q. R. Co. v. City of Chicago, 166 U.S. 226.

Your petitioner asserted in its petition for certiorari that the final order and decision of the state Court, purportedly authorized under the California Public Utilities Act as construed by the California Supreme Court, if enforced, will constitute state action by which your petitioner is deprived of its property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Petitioner herein also recognizes the rule of law enunciated in many decisions of this Court that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law.

While recognizing that the application of the foregoing principles affords good ground for the denial of a petition for writ of certiorari in many cases brought before this Court, such principles are not applicable to the case at bar for reasons which we fear have been overlooked by the Court in making the order as to which we request reconsideration.

In our reply brief we considered the contentions of the City and County of San Francisco that our claim of deprivation of property without due process of law was ill founded because the California Supreme Court had found that your petitioner had no property interest in the fares collected by it in excess of the rate ordered by the Railroad Commission. In case our reply brief was not filed in time to receive the consideration of this Court, we repeat what we there said:

Counsel for City and County of San Francisco have contended in their brief (p. 15 and following) that this Court does not have jurisdiction to hear this cause because the Court below found that petitioner was not the legal owner of all fares collected by it while the stay order was in effect, and such determination is conclusive upon this Court.

We, however, contend that such finding or decision of the Court below is not based upon or supported by any substantial evidence, and that, such determination, in view of petitioner's claim of federal right, requires an examination of the record to ascertain if such ground of decision is broad enough or adequate to sustain the decision.

In the brief of City and County of San Francisco it is said (p. 16) that the theme of the present petition for writ of certiorari is that the Court below erred as to the determination of absence of property interest and that therefore the petitioner has been deprived of property without due process of law, and that:

> "There is, of course, no claim of a lack of procedural due process."

In making the statement quoted above counsel for City and County are in error. Petitioner contended in its petition that the ruling of the Court as to the property interest of petitioner in the excess fares is arbitrary and such ruling is unsupported by the evidence. *A decision not based upon substantial evidence is invalid for lack of due process.*

In the petition herein (p. 17) petitioner has urged that the California Supreme Court erred:

1. In holding that petitioner was not the legal owner of all moneys collected by it for the transportation of passengers during the time the operation of the order of the California Railroad Commission was suspended by the order of said Court.

2. In holding that petitioner had no legal ownership in the unclaimed excess charges by reason of a condition inserted in the stay order by the Court over the objections of petitioner, which was not required or authorized by Sections 67 and 68 of the California Public Utilities Act, and in holding that petitioner necessarily accepted the conditions of the order by acceptance of the stay.

The record is devoid of any evidence to sustain the two findings set forth in the specification of errors above quoted.

Where the existence of the alleged federal question itself depends upon a finding of fact, the Supreme Court will examine the facts to see whether the evidence adequately sustains the finding.

King v. Putnam Investment Co., 248 U.S. 23, 39 S.Ct. 15, 63 L.Ed. 102;

Truax v. Corrigan, 257 U.S. 312, 324, 42 S.Ct. 124, 66 L.Ed. 254, 27 A.L.R. 375.

In *Fiske v. Kansas,* 274 U.S. 380, it was held that a state syndicalism act was applied to sustain the conviction of defendant without any charge or evidence that the organization in which he secured members advocated any crime, violence or other unlawful acts, and that as thus

applied the act was an arbitrary and unreasonable exercise of the police power of the state, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the 14th Amendment. It was there said (p. 385):

> "And this court will review the finding of facts by a State Court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." (Cases cited.)

In *Truax v. Corrigan,* 257 U.S. 312, this Court said:

> "In cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. *If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here.*"

If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds.

Davis v. Wechsler, 263 U.S. 22.

The Supreme Court of the State of California has avoided deciding the oft asserted claim of petitioner herein that to take the unclaimed excess charges from it and to award the same to the City and County of San Francisco, or to the State of California, would be to deprive it of its property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, by the mere statements that "Legal ownership is not a factor appearing in the present case" and "In the stay order it was recognized that the company should be entitled to the additional one cent for each fare collected pending review only if it prevailed and the Commission's order was annulled".

Whether the determination of the question of ownership be regarded as a finding of fact or a conclusion of law, in either event, unless such finding of fact be supported by the evidence in the record, or such conclusion of law be predicated upon a finding of fact supported by evidence, petitioner has not been afforded due process.

This Court has frequently held that it will review the findings of facts by a State Court where the Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.

Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U.S. 655, 668.

The rule enunciated above has found expression by this Court in many types of cases. For example, in *Schlem-*

mer v. Buffalo, P. & R. Co., 205 U.S. 1, the case arose under the Federal safety appliance law, and the State Court found that the deceased contributed to his injury by his own negligence, thereby preventing a recovery. This Court exercised the power to examine the evidence, notwithstanding a contention that the finding was conclusive, and reversed the judgment upon the ground that it appeared that what had been found to be contributory negligence was at most an assumption of the risk, which was not a defense under the Federal statute.

Perhaps the most frequent exercise of this power occurs in cases arising under the clause of the Constitution forbidding a State to pass any law impairing the obligation of a contract, *the existence of the contract in such cases being a mixed question of law and fact.* In *Louisville Gas Co. v. Citizens' Gaslight Co.*, 115 U.S. 683, 697, a leading case upon this subject, it was said:

> "Whether an alleged contract arises from state legislation, or by agreement, with the agents of a state, by its authority, or by stipulations between individuals exclusively, *we are obliged, upon our own judgment, and independently of the adjudication of the state court, to decide whether there exists a contract within the protection of the Constitution of the United States.*"

It is respectfully submitted that when due regard is had for the rule before indicated, and so often applied in so many different types of cases, it does not admit of doubt that in the case at bar this Court should examine the entire record, which includes the only evidence which was received by the Court below, to determine whether

the general finding that petitioner was not the legal owner of the fares collected by it during the pendency of the review proceedings necessarily involved the decision of questions of law bearing upon the right under the Constitution of the United States set up by petitioner herein.

It is of no consequence, as respects the jurisdiction of the Supreme Court of the United States to review a judgment in a proceeding, that it was rendered in an original proceeding in the highest court of a state, and not in a case pending before that court on appeal.

Hartman v. Greenhow, 102 U.S. 672.

In *Hooven & Allison Co. v. Evatt,* 324 U. S. 652, it was said:

> "In all cases coming to us from a state court, we pay great deference to its determinations of fact. *But when the existence of an asserted Federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity as applied, we are free to reexamine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained.*" (Cases cited.)

In *Sterling v. Constantin,* 287 U.S. 378, a case where the Governor of the State of Texas sought to deprive citizens of their property by means of the use of military power, it was asserted by the State that a federal court was powerless to intervene to protect civil rights. This Court there said:

> "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United

States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. * * * *Accordingly, it has been decided in a great variety of circumstances that when questions of law and fact are so intermingled as to make it necessary, in order to pass upon the Federal question, the court may, and should, analyze the facts. Even when the case comes to this Court from a state court this duty must be performed as a necessary incident to a decision upon the claim of denial of Federal right.''* (Cases cited.)

In the case at bar the state court has sought to prevent a review of its action under a statute, which as construed by such court, permits the property of petitioner to be taken without due process of law, by the simple expedient of declaring that your petitioner was not the legal owner of the fares collected by it because it (the court) did not want petitioner to become the legal owner of such fares.

A review of the facts of record in the case at bar should be made by this Court, as stated in the foregoing case, for the purpose of determining whether there is any substantial evidence to support the determination as to legal ownership by the state court. We submit there is none.

Such determination is necessary for this Court to pass upon the Federal question.

By the decision of the State Court, money, which had been paid to your petitioner by its passengers in excess of the rate prescribed in the order of the Railroad Commission while said order was suspended pending judicial review, and which was unclaimed by the passengers paying the same, is required to be paid over to the City and County of San Francisco as a condition for the exoneration of your petitioner's stay bond, and the return to it of its securities.

By the decision of the State Court a non-statutory condition for the exoneration of a statutory bond is imposed upon petitioner. The suspending bond during pendency of writ of review which was furnished by petitioner in accordance with the requirements of the order of the California Supreme Court dated March 8, 1944, appears in the original record transmitted to this Court at page 178 thereof, although it was omitted by the Clerk of this Court in printing the record. This $100,000 bond was executed by Seaboard Surety Co., as surety, and the condition for liability of said surety is fixed in the bond as follows:

> "Now, Therefore, the condition of this obligation is such that if the above named Market Street Railway Company, a corporation, shall promptly pay or cause to be paid all damages caused by the delay in the enforcement of said decision and order of the Railroad Commission and all moneys which any person or corporation may be compelled to pay for transportation over the facilities of said Market Street Railway Company in the City and County of San

> Francisco pending the review proceedings, in excess of the charges fixed by said decision and order of the Railroad Commission in case said order and decision is sustained, then this obligation to be void; otherwise to remain in full force and effect."

This statutory stay bond follows the language of Section 68(d) of the California Public Utilities Act. (See Appendix, Petition for Certiorari.) It contains no provision that petitioner herein shall pay any money to the City and County of San Francisco, nor does the statute under which it was given require the payment by your petitioner of any money to the City and County of San Francisco or to any person or corporation other than the persons or corporations paying such excess charges. Section 68(e) of the Act provides in part that:

> "Upon the final decision by the Supreme Court, all moneys which the public utility may have collected, pending the appeal in excess of those authorized by the order or decision of the Commission, together with such interest as may be reasonable, shall be promptly paid to the corporations or persons entitled thereto in such manner and through such methods of distribution as may be prescribed by the court, should the Commission order or decision be upheld."

No money judgment was rendered against petitioner herein. The order of the California Supreme Court is that upon receipt by the Clerk of said Court of a cashier's check in the sum of $688,751.58, payable to the City and County of San Francisco, the clerk is directed to deliver to petitioner the securities deposited by petitioner, and that the surety on its bond of $100,000 shall stand exonerated.

For the reason that there appears to be no liability on the part of petitioner's surety under the statutory bond furnished by petitioner to pay any money to the City and County of San Francisco in the event that petitioner fails to pay the amount required by said order, it is urged that this fact demonstrates the arbitrary nature of the order made by the State Court by which petitioner is deprived of its property without due process of law.

In order that further litigation be avoided, it is respectfully urged that this Court reconsider its order denying petitioner's petition for certiorari, and that the petition be granted.

In conclusion, it is respectfully submitted that the final order of the California Supreme Court is arbitrary and unjust, and that the California Public Utilities Act, which has been construed by said Court as authorizing it to take the property of petitioner and to award the same to a municipal corporation, is in violation of Section 1 of the 14th Amendment to the Constitution of the United States. Therefore, we pray that the order of this Court entered December 16, 1946, denying certiorari be vacated and upon reconsideration that the writ of certiorari issue.

Dated, San Francisco, California,
January 3, 1947.

Respectfully submitted,
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